90-453

Supreme Court, U.S.
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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

RORY DOREMUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court
Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether criminal prosecution of an owner of a valid unpatented mining claim, for removing trees on his mining claim, violates his constitutional right to due process where:

(a) The trees are removed in order to clear his exploration site;

(b) The right of removal is granted by statute without having to comply with sound principles of forest management;

(c) The rule of law in the Ninth Circuit prior to this decision was that the claim owner's statutory right precluded criminal prosecution for removal of trees;

(d) The Forest Service regulations exempt from prosecution any act authorized by the Federal Mining Laws;

(e) The Forest Service regulations

require a determination that the action caused unreasonable and unnecessary damage to surface resources prior to criminal prosecution;

(f) The tree removal is not prohibited by the claim owner's approved operating plan; and

(g) The statute which authorized the Forest Service to manage surface resources on mining claims (30 U.S.C. § 612) does not prohibit tree removal and does not authorize the Forest Service to prohibit tree removal.

PARTIES TO THE PROCEEDINGS

1. Petitioner is Rory Doremus. Mr. Doremus and his brother, David Doremus, were defendants in the District Court, and appellants in the Court of Appeals for the Ninth Circuit.

2. Respondent, United States of America, was the plaintiff in the District Court and appellee in the Court of Appeals for the Ninth Circuit.

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IN THE
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RORY DOREMUS,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

Rory Doremus petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit was entered on October 31, 1989 and appears at p. 1a of the Appendix to this Petition. It is reported at 888 F.2d 630. The Order of

the United States Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing was entered on May 29, 1990. It appears at p. 30a of the Appendix to this Petition.

The Decision of the United States District Court for the District of Idaho, affirming the Magistrate's Judgment of Conviction, was entered April 21, 1987. It appears at p. 80a of the Appendix. The Decision of the District Court is reported at 658 F.Supp. 752. The Magistrate's Judgment of Conviction, entered August 5, 1986, appears at p. 31a of the Appendix. There is no reported decision of the Magistrate.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 31, 1989. Petitioner filed a timely Petition for Rehearing, which was denied May 29, 1990. Appendix, p. 30a. This Petition was filed within

sixty (60) days after such denial, as permitted by Supreme Court Rule 20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

Petitioner Rory Doremus, and his brother, David Doremus, own valid unpatented lode and placer mining claims located in Nez Perce National Forest, in central Idaho. Since 1972 they have been conducting mining exploration and development work upon their mining claims. The validity of their mining claims is not in question.

In May, 1985 their Operating Plan was approved by the United States Forest Service. The Operating Plan prohibited removal of live green trees for firewood but did not prohibit the removal of trees under any other circumstance. The Operating Plan appears at p. 110a of the Appendix.

In 1985 the Forest Service charged the Doremuses with violation of 36 C.F.R. § 261.9(a) (damaging a natural feature). The violation notice appears at p. 37a of the Appendix.

Petitioner requests review of his conviction for "damaging trees and surface resources on national forest land" in violation of 36 C.F.R. § 261.9(a). This charge stemmed from the removal of several trees in order to clear an ore bearing vein located on his claim for exploration purposes. Section 261.9(a) prohibits damaging any natural feature or other property of the United States. The Forest Service did

not charge Petitioner with violating his Operating Plan as a result of the tree removal. Nothing contained in Petitioner's Operating Plan precluded Petitioner from removing trees for exploration purposes. There is no evidence that the removal caused unreasonable or unnecessary damage to surface resources. The government merely proved that the trees were pushed over and the Operating Plan did not expressly authorize the removal. Section 261.1(b) of the regulations exempts from prosecution any act which is authorized by the "United States Mining Laws Act of 1872, as amended."

On Appeal, the Ninth Circuit affirmed Petitioner's conviction. It held that Petitioner's removal of trees on his valid claim was not an activity "authorized by Federal law" and thus was not exempted from criminal prosecution under 36 C.F.R. § 261.1(b). The Court held that the Federal law, including 30 U.S.C. § 612(c), did not

permit a claim owner to remove trees from his claim for any purpose, in the absence of prior approval of the Forest Service. Section 612(c) of Title 30, on its face, grants a claim owner the authority to remove timber from his claim for clearance purposes. Prior to this case, the Ninth Circuit had held that § 612(c) authorized removal of timber if required for development of the claim. U.S. v. Caruthers, 523 F.2d 1306 (9th Cir. 1975). In that case, which was the rule of law in the Ninth Circuit prior to this case, the Court found that the authority granted to the claim owner by § 612 precluded his criminal conviction for removal of the trees from his claim. The statute and regulations appear in the Appendix at p. 40a and p. 70a.

REASONS FOR GRANTING THE WRIT

I.

This case involves important issues of Federal law pertaining to the use of valid

mining claims located in national forests. The Federal Mining Law grants certain rights to the owner of a valid mining claim, including the right to remove timber for clearance of the claim in order to conduct mining and prospecting operations. 30 U.S.C. § 612. The same statute grants authority to the Forest Service to manage the vegetative surface resources within a mining claim, so long as such does not materially interfere with the claim owner's mining and prospecting uses. This dual authority requires a delicate balancing of important federal policies. On the one hand, Congress has instructed the Forest Service to protect our national forests. On the other hand, Congress has declared that the development of mineral resources on public land is of high national priority and has reaffirmed the importance of private development through the mineral location laws. California Coastal Comm'n v.

Granite Rock, 480 U.S. 572, 94 L.Ed.2d 577 at 601; U.S. v. Weiss, 642 F.2d 296 at 299 (9th Cir. 1981). This case is the first case to present a direct conflict between the Forest Service's management of vegetative surface resources on a mining claim and the claim owner's development of the mineral resources. The conflict is brought into sharp focus by the following facts:

(a) The claim owner is authorized by Congress to remove timber for clearance purposes without having to comply with sound principles of forest management;

(b) The Forest Service is authorized to manage the vegetative surface resources on the mining claim;

(c) The Forest Service regulation makes the damaging of any natural feature a crime;

(d) Prospecting and mining activities, and especially tree removal,

necessarily result in damage to a natural feature;

(e) The Forest Service requires the claim owner to obtain an approved plan of operation prior to engaging in any activity which significantly disturbs the surface of the claim;

(f) Mining and prospecting activities, and especially tree removal, do necessarily result in significant surface disturbance; and

(g) The Circuit Court decision creates criminal liability whenever a mining claimant engages in a prospecting or mining activity which is not expressly defined and approved in the Operating Plan.

The Circuit Court's decision has, for all practical purposes, eliminated the delicate balance, previously struck by 100 years of Congressional enactment and judicial interpretation, between mineral deve-

lopment and national forest preservation. It is submitted that Congress and not the Courts should alter the present balance between these important national policies.

II.

It is essential that the Court review this case in order to correct an erroneous interpretation of a federal statute that is an important element of our national policy regarding the development of mineral resources. Petitioner was prosecuted for damaging a natural feature. 36 C.F.R. § 261.9(a). The damage resulted from his removal of trees to clear away the ore bearing vein he wished to explore. If the tree removal was authorized by "the U.S. Mining Laws Act of 1872, as amended", it was exempted from prosecution. 36 C.F.R. § 261.1(b). The 1872 Mining Law, including 30 U.S.C. § 612, confer certain rights upon the owner of a valid unpatented mining claim, in the nature of a grant from the

United States. 30 U.S.C. §§ 22 and 26. Wilbur v. United States ex rel Krushnic, 280 U.S. 306, 74 L.Ed. 445; Ickes v. Virginia-Colorado Development Co., 295 U.S. 639, 79 L.Ed. 1627; Boesche v. Udall, 373 U.S. 472, 10 L.Ed.2d 491; Cole v. Ralph, 252 U.S. 286, 64 L.Ed. 567; Cameron v. United States, 252 U.S. 450, 64 L.Ed. 659; California Coastal Comm'n v. Granite Rock, 480 U.S. 572, 94 L.Ed.2d 577. This grant from the United States includes the right to remove timber located on the claim for uses reasonably incident to the claim owner's mining, development or exploration activities. United States v. Deasy, 24 F.2d 108 (Idaho 1928). The claim owner is authorized by the grant to cut down and destroy trees located on the claim if such is reasonably necessary in order to carry on his prospecting and mining activities, United States v. Nelson, 5 Sawy 68 (Ore. 1878), 27 Fed. Case No. 15,864. The

Surface Resource Act of 1955 (30 U.S.C. § 612) was enacted to "make clear to locators what can and what cannot be done" with respect to the surface of their claims. 1955 U.S. Code Cong. and Adm. News, p. 2479. The purpose of the Act was to define the rights of locators of mining claims to surface resources prior to patent:

> "In short, this subsection recognizes essential rights-mining claims can, in the future, be used for activities related to prospecting, mining, processing and related activities, though not for unrelated activities." 1955 U.S. Code Cong. and Adm. News, p. 2482.
>
> "This language, carefully developed, emphasizes that committee's insistence that this legislation not have the effect of modifying long standing essential rights springing from location of a mining claim." 1955 Code Cong. and Adm. News, p. 2483. (Emphasis added)

The clear congressional intent was to restate in § 612 those rights the claim owner already had with respect to surface resources within his claim. If the claim owner is entitled to conduct an activity on his claim by reason of 30 U.S.C. § 612, he is authorized to do so by the 1872 Mining Law. Section 612 provides, in part:

> "Any severance or removal of timber which is permitted under the exception of the preceeding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management." 30 U.S.C. § 612(c). (Emphasis added)

Congress intended that the "preceding sentence" permit or "authorize" the severance or removal of timber from the claim. The "preceding sentence" of § 612(c) states this exception:

> "Except to the extent required for the mining claimants prospecting, mining or

> processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the U.S. . . . " (Emphasis added)

The meaning of this subsection is clear on its face. A claim owner is authorized to sever and remove timber from his claim, without adhering to sound principles of forest management, if such is required to provide clearance for his prospecting, mining or processing operations or uses reasonably incident thereto. There can be no question about the authority granted under this statute.

In 1975 the Ninth Circuit held that the miner's authority under § 612 precluded prosecution for cutting trees on defendant's claims. U.S. v. Caruthers, 523 F.2d 1306 (9th Cir. 1975). This has been the

rule of law since 1872 and is Forest Service Policy. Forest Service Manual, §§ 2813.14 and 2813.13b.

The authority granted to the claim owner in § 612 is independent of any authorization the Forest Service may grant to cut timber, pursuant to its management of the surface resources. Were this not the case the clause "or to the extent authorized by the U.S." contained in § 612(c) would be superfluous. Petitioner was authorized by the Federal Mining Laws to remove the trees in question and thus exempted from prosecution under 36 C.F.R. § 261.1(b). In this respect the statute is self executing.

The Circuit Court erroneously reasoned that since § 612 authorized the Forest Service to manage the surface resources within a mining claim located after 1955 and Part 228 of the regulations requires an operating plan; that, therefore, only those acts that were expressly approved by the

Forest Service in the operating plan were "authorized by the U.S. Mining Laws Act of 1872, as amended". The fallacy of this reasoning is apparent. Section 612 authorizes both the claimant's removal of timber and the Forest Service's management of vegetative surface resources. These two authorities are coexistent but separate. The Forest Service regulations are not part of the "U.S. Mining Laws Act of 1872, as amended". They were promulgated under 16 U.S.C. § 551, enacted in 1897. California Coastal Comm'n v. Granite Rock, supra. Therefore, the regulations cannot be the source of the authority referred to in § 261.1(b) of the regulations. In the case of removal of timber for clearance purposes, there is very little latitude for surface resource management. The claimant may chose to totally destroy the trees in the course of their removal, since he does not have to follow sound principles of

forest management. Since Doremus had the right to remove the trees for clearance without complying with sound principles of forest management, there was no environmental regulation which the Forest Service could impose in the Operating Plan and hence no reason for its inclusion in the plan. Any prohibition of such removal would have been out of harmony with the statute and a mere nullity. United States v. Larinoff, 431 U.S. 864, 53 L.Ed.2d 48. Therefore, the fact that such removal is not specifically addressed in the Plan is of no significance.

The Circuit Court's reasoning is closely analogous to the Government's argument for conviction in United States v. Laub, 385 U.S. 475, 17 L.Ed.2d 526 (1967). The Court rejected the argument holding that the statute which granted the agency's authority to regulate did not authorize the agency to prohibit the act in question. Moreover,

the regulations relied upon did not purport to make the conduct in question illegal. In this case § 612 grants general authority to the Forest Service to manage the vegetative surface resources. It does not authorize the Forest Service to prohibit tree removal. The regulations dealing with mining, Part 228, do not purport to prohibit tree removal. In fact, they authorize it. As in Laub, the regulations are cast exclusively in civil terms. The Circuit Court had to create the crime in this case by inference. First, it inferred from the management authority conferred in § 612, that the Forest Service had the power to prohibit tree removal. Second, it inferred from an absence of approval in the Operating Plan that tree removal was unreasonable and, thus prohibited. The Court in Laub flatly rejected this approach to criminal justice:

"Crimes are not to be created by

inference. They may not be constructed nunc pro tunc. Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in Raley v. Ohio, 360 U.S. 423, 438, 3 L.Ed.2d 1344, 1355, 79 S.Ct. 1257, we may not convict 'a citizen for exercising a privilege which the State clearly had told him was available to him.' As Raley emphasized, criminal sanctions are not supportable if they are to be imposed under 'vague and undefined commands . . . ; or if they are 'inexplicably contradictory' . . .; and certainly not if the Government's conduct constitutes active misleading' . . . ." 17 L.Ed.2d 534.

Section 261.1(b) of the regulations was intended to insure that the agency's management of the surface resources within a valid mining claim not conflict with the

statutory rights of the claim owner. The interplay between the claim owner's statutory rights and the agency's management of surface resources was addressed in United States v. Weiss, 642 F.2d 296 (9th Cir. 1981):

> "We believe that the important interests involved here were intended to and can co-exist. The Secretary of Agriculture has been given the responsibility and the power to maintain and protect our national forests and land therein. While prospecting, locating and developing of mineral resources of the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition, the Secretary may adopt reasonable rules and regulations which do not impermissably encroach upon the right to the use and enjoyment of placer claims for mining purposes." 642 F.2d 299.

III.

The Court's review of this case is essential for another reason. The Circuit Court decision misinterprets the adopted policy and regulations of the Forest Service. The clear policy of the Forest Service is to regulate the vegetative surface resources on a mining claim in such a way as to avoid any interference with exercise of the claim owner's rights under the Federal Mining Laws. The regulatory scheme adopted by the agency provides extensive procedural and substantive safeguards to insure that a mining claimant is not prosecuted for reasonable mining and prospecting activities and to insure that criminal prosecution is a compliance measure of last resort, even if the mining claimant is engaged in activities which are not required for mining or prospecting purposes:

(1) Any activity which is authorized by

the U.S. Mining Laws Act of 1872, as amended, is exempted from prosecution. 36 C.F.R. § 261.1(b).

(2) Forest Service policy is to recognize the claim owner's right, under the Federal Mining Laws, to cut timber on his claims. Forest Service Manual, § 2813.13b-2.

(3) A notice of non-compliance for violation of an operating plan can be issued only if the non-compliance is unnecessarily or unreasonably causing damage to surface resources. 36 C.R.F. § 228.7.

(4) Forest Service policy is to serve a notice of non-compliance or pursue criminal prosecution only if the non-compliance unreasonably or unnecessarily causes damage to surface resources and reasonable attempts to obtain voluntary compliance have failed. Forest Service Manual,

§§ 2817.03 and 2817.3.

(5) Forest Service policy is to encourage prospecting and mining and refrain from unduly hampering these activities. Forest Service Manual, §§ 2811.5 and 2814.24.

The Forest Service Manual states Forest Service policy. California Coastal Comm'm v. Granite Rock, supra, 94 L.Ed.2d at p.603; 36 C.F.R. § 200. The Circuit Court erred by failing to give effect to the total body of regulations and policy pertaining to management of surface resources within mining claims. United States v. Larinoff, 431 U.S. 864, 53 L.Ed.2d 48; Udall v. Tallman, 380 U.S. 1, 13 L.Ed.2d 616; Jay v. Boyd, 351 U.S. 345, 100 L.Ed. 1242.

The procedural and substantive protections afforded to the claim owner by the Forest Service regulations must be adhered to by the Forest Service. They provide for

the defendant's intent and for protection of his statutory rights. They are important elements of Petitioner's right to due process in this case. Vitarelli v. Seaton, 359 U.S. 535, 3 L.Ed.2d 1012 (1959); Service v. Dulles, 254 U.S. 363, 1 L.Ed.2d 1403 (1957). The Circuit Court's decision deprived defendant of these safeguards.

IV.

The Court's review of this case is further required because the Circuit Court's decision violates Petitioner's right to due process. The decision is contrary to Supreme Court decisions which establish applicable constitutional limitations on Petitioner's prosecution in this case.

This Court has required application of the rule of lenity when the ambit of criminal conduct is uncertain. The rule of lenity is rooted in fundamental principles of due process, which mandate that no indi-

vidual be forced to speculate, at peril of indictment, whether his conduct is prohibited; and that to insure that an agency speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not clearly and unmistakably proscribed. Dunn v. United States, 442 U.S. 100, 60 L.Ed.2d 743 (1979). The rule of lenity compels construction of the statute in favor of the criminal defendants. Dixson v. United States, 465 U.S. 482, 79 L.Ed.2d 458; Rewis v. United States, 401 U.S. 808, 28 L.Ed.2d 493; Huddleston v. United States, 415 U.S. 814, 830-31, 39 L.Ed.2d 782 (1974). The rule of lenity applies with equal force to the interpretation of criminal regulations. United States v. Mersky, 361 U.S. 431, 4 L.Ed.2d 423 (1960); Adamo Wrecking Co. v. United States, 434 U.S. 275, 54 L.Ed.2d 538 (1978). The Circuit Court erred in

refusing to apply the rule of lenity to Doremus' conviction. Groves v. Modified Retirement Plan, 830 F.2d 109 (3rd Cir. 1986).

The Circuit Court decision holds that any activity or effect not defined and approved in the plan of operation is necessarily prohibited and criminal. The concept that an activity, otherwise lawful, is criminally prohibited unless affirmatively authorized by the agency completely fails to give notice of the acts prohibited. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); United States v. Harriss, 347 U.S. 612, 617. As a consequence, the agency has the power to impose criminal liability arbitrarily. Regan v. Time, Inc., 104 S.Ct. 3262, 3284 (J. Brennan Opinion). The operating plan was elevated by the Circuit Court to the position of a statute or regulation for purposes of criminal prosecution. It failed to

give reasonable notice to Petitioner of the proscribed conduct (i.e. tree removal) since it failed to address the conduct at all, and thus failed to satisfy the constitutional due process requirement of definiteness. United States v. Harriss, supra.

Closely related to the requirement of definiteness is the due process requirement that a new and different statutory construction may not be applied retroactively to "a time when the conduct was not fairly stated to be criminal". Bouie v. City of Columbia, 378 U.S. 347, 362 (1964). Pre-existing mining law, including U.S. v. Caruthers, supra, U.S. v. Deasy, supra, U.S. v. Nelson, supra, 30 U.S.C. § 612, as well as Part 228 and § 261.1(b) of the Forest Service regulations and Forest Service policy stated in the Forest Service Manual, gave no warning at all to Petitioner that removal of trees during the course of his exploration activities would subject

him to criminal liability. Prior to this case, the rule of law in the Ninth Circuit was that the claim owner had a statutory right to remove timber which precluded criminal prosecution. Caruthers v. United States, supra. The government's promulgation of § 261.1(b) and stated policy recognizing the miner's right to remove timber actively reinforced Petitioner's belief that his removal of trees was not criminal. As in Bouie, Petitioner's conviction violates due process.

CONCLUSION

The Petition for Writ of Certiorari should be granted and the Judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

SPECIAL EARTHQUAKE NOTICE

This opinion is being filed while the Clerk's office in San Francisco is closed due to severe earthquake damage. Once the Clerk's office is operational, notices will be placed in legal newspapers throughout the Circuit. At that time parties may seek additional time to file a petition for rehearing if they desire to file one.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America, Plaintiff-Appellee, v. RORY DOREMUS AND DAVID DOREMUS, Defendants-Appellants.	No. 87-3831 D.C. NO. MISC-3025-HLR OPINION

Appeal from the United States District Court for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
July 12, 1988 - Seattle, Washington

Filed October 31, 1989

Before: Cecil F. Poole, William C. Canby, Jr. and Edward Leavy, Circuit Judges.

Opinion by Judge Poole

SUMMARY

Mines and Minerals

Affirming the district court's judgment of conviction, the court held that the requirement of prior approval does not endanger or materially interfere with mining operations.

Appellant brothers Rory and David Doremus have staked mining claims in the Nez Perce National Forest in Idaho, and since 1972, have conducted mining operations under operating plans approved by the Forest Service. In 1985, the operating plan at issue was executed by Rory Doremus and the District Ranger for the Red River Ranger District. Between July 23 and July 31, 1985, Forest Service representatives visited the site and observed more than 30 open trenches crisscrossing more than 1½ acres. Several trees had been pushed over, and a road constructed through the trees. Violation notices were issued, and appel-

lants were tried before a federal magistrate. The magistrate issued a memorandum opinion denying apellants' motion to dismiss and finding them guilty beyond a reasonable doubt. The district court affirmed their convictions.

[1] Appellants contended that their activities were authorized by statute, 36 C.F.R. § 261.1(b)(1987), and that therefore the regulations do not prohibit such activities. [2] The court rejected appellants' argument that the effect of this regulation is to exempt mining operations from the general prohibitions of Part 261, thereby limiting the regulation of mining operations to 36 C.F.R. Part 228. Part 228 does not contain any independent enforcements, providing only that an operator be given a notice of non-compliance and an opportunity to correct the problem. [3] Appellants argued also that even if Part 261 applies to them, the Forest Service is

barred from prohibiting any conduct that was reasonably incident to their mining operation. The district court held that the operating plan itself becomes the definition of what is reasonable conduct and therefore any violation of the operating plan was per se unreasonable under the statute. The district court also held that the regulations did not conflict with 30 U.S.C. § 612 because the regulatory right is limited so as not to endanger or materially interfere with mining operations. [4] The court agreed with the district court that the regulation is consistent with the mining laws. The regulatory scheme of requiring a notice of intent to operate and approval of an operating plan is a reasonable method of administering the statutory balance between the important interests involved here which were intended to and can co-exist. [5] Appellant's claim that the operating plan is ambiguous is without

merit. The plan is not only not vague, but is defined with numerical precision. No reasonable person could construe the plan as allowing more than 30 trenches to be open simultaneously. [6] Section 612 does not authorize mining operators to act without Forest Service approval, and the operating plan did not authorize the cutting of live trees. It does not give appellants a blanket license to remove live trees in any manner and quantity they believe to be reasonable. The court concluded that section 261.9(a) is not unconstitutionally vague as applied.

OPINION

POOLE, Circuit Judge:

Appellants Rory and David Doremus were convicted of violating United States Forest Service regulations which prohibit "[d]amaging any natural feature or other property of the United States" (36 C.F.R. § 261.9(a)

(1987)) and "[v]iolating any term or condition of...[an] approved operating plan" (36 C.F.R. § 261.10(k)(1987)). On appeal, appellants contend that their activity was permissible as "reasonably incident" to their mining operation (see 30 U.S.C. §612 (1982)) and that the regulations are unconstitutionally vague. We affirm.

FACTS AND PROCEEDINGS BELOW

Appellants are brothers who have staked mining claims in the Red River Ranger District of the Nez Perce National Forest in central Idaho. Since 1972, appellants have conducted mining operations on these claims under operating plans approved by the Forest Service.

On May 13, 1985, the operating plan at issue was executed by Rory Doremus and Jerry Dombrovske, District Ranger for the Red River Ranger District. Paragraph IV of the plan provides that "[t]he area of exploration will be concentrated to the

clear cut," and that "[n]o more than five trenches will be open at one time." The magistrate found that the latter provision was proposed by the appellants. The plan also prohibited the cutting of live, green trees for firewood and provided that "[i]f timber is needed operator is asked to cut small dead timber." The plan neither expressly authorized nor expressly prohibited the removal of live trees in conducting the mining operation.

Between July 23 and July 31, 1985, Forest Service representatives visited the site and observed more than 30 open trenches, some larger than 10 feet by 30 feet, crisscrossing more than 1¼ acres.[1] Several trees had been pushed over, and a road had been constructed through the trees on one side of the claim. Violation notices were issued, and appellants were tried before a federal magistrate on March 14, 1986. On June 18, 1986, the magistrate

issued a Memorandum opinion denying the Doremuses' motion to dismiss and finding them guilty beyond a reasonable doubt. The Doremuses appealed to the district court, which affirmed their convictions. United States v. Doremus, 658 F.Supp., 752 (D.Idaho 1987).

STANDARD OF REVIEW

The questions presented involve the construction of federal law and its application to essentially undisputed facts, and therefore they are reviewed de novo. United States v. McConney, 728 F.2d 1195, 1201-02 (9th Cir.,)(en banc), cert. denied, 469 U.S. 824 (1984). The factual findings of the magistrate will not be overturned unless they are clearly erroneous. United States v. Nance, 666 F.2d 353, 356 (9th Cir.), cert. denied, 456 U.S. 918 (1982).

DISCUSSION

I. STATUTORY CHALLENGES

A. Applicability of Regulations

[1] Appellants' first argument is that they are exempted from the prohibitions of 36 C.F.R. Part 261 by the provision which states:

> Nothing in this part shall preclude activities as authorized by...the U.S. Mining Laws Act of 1872 as amended.

36 C.F.R. § 261.1(b)(1987). Appellants contend that their activities were authorized by statute and that therefore the regulations do not prohibit such activities.

Appellants' statutory rights derive from the provision in the 1872 Act which reserves to the claimant "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." 30 U.S.C. § 26(1982). This right was limited by the Surface Resources and Multiple Use Act of 1955, which reserved to the United States the right to manage and dispose of surface resources on unpatented mining claims; however, the 1955 Act provi-

des that such use shall not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b)(1982). The same statute also prohibits the removal of vegetative surface resources "[e]xcept to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto,...or to provide clearance for such operations or uses." 30 U.S.C. § 612(c).

[2] Appellants argue that the effect of 36 C.F.R. § 261.1(b) is to exempt mining operations from the general prohibitions of Part 261, thereby limiting the regulation of mining operations to 36 C.F.R. Part 228. We reject this argument. Part 228 does not contain any independent enforcement provisions; it only provides that an operator must be given a notice of non-compliance and an opportunity to correct the problem.

36 C.F.R. § 228.7(b)(1987). The references to operating plans in § 261.10 would be meaningless unless Part 261 were construed to apply to mining operations, since that is the only conduct for which operating plans are required under Part 228. In addition, 16 U.S.C. § 478(1982), which authorizes entry into national forests for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," specifically states that "[s]uch persons must comply with the rules and regulations covering such national forests." This statutory caveat encompasses all rules and regulations, not just those (such as Part 228) which apply exclusively to mining claimants. In this context, § 261.1(b) is merely a recognition that mining operations "may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition." United States v. Weiss, 642 F.2d

296, 299 (9th Cir. 1981).

B. Validity of Regulations

[3] Next, appellants argue that even if Part 261 applies to them, the Forest Service is barred by 30 U.S.C. § 612 from prohibiting any conduct unless it proves that the conduct was not "reasonably incident" to their mining operation. The district court rejected this argument, holding that "the operating plan itself becomes the definition of what is reasonable and significant conduct under the circumstances," and that therefore any violation of the operating plan was per se unreasonable under the statute. 658 F.Supp. at 755. The district court also held that the regulations did not conflict with 30 U.S.C. § 612 because "th[e] regulatory right is limited so as not to endanger or materially interfere with mining operations." Id. at 756, citing United States v. Richardson, 599 F.2d 290 (9th Cir. 1979), cert. denied, 444

U.S. 1014 (1980).

[4] We agree with the district court that 36 C.F.R. § 261.10(k) is consistent with the mining laws. The regulatory scheme of requiring a notice of intent to operate and approval of an operating plan is a reasonable method of administering the statutory balance between "the important interest involved here [which] were intended to and can coexist." Weiss, 642 F.2d at 299. The purpose of requiring prior approval is to resolve disputes concerning the statutory balance before operations are begun, not after. If the appellants were unsatisfied with the conditions of the plan, they could have appealed to the Regional Forester under 36 C.F.R. § 228.14(1987). His decision would then be subject to review under the Administrative Procedure Act. See 5 U.S.C. §§ 701 et seq. (1982); cf. Savin v. Butz, 515 F.2d 1061, 1065 (10th Cir. 1975) (recognizing juris-

diction under APA to review denial of special use permit). David Doremus admitted in his opening brief that appellants recognized that an appeal was a possible course of action and deliberately chose to forego it. David Doremus' Opening Brief at 23.2 Having failed to appeal the plan, appellants may not now complain that the restriction limiting appellants to five open trenches was "unreasonable." See United States v. Brunskill, 792 F.2d 938, 941 (9th Cir. 1986) (refusing to consider merits of operating plan where defendants did not appeal rejection of proposed plan); cf. United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1286 (9th Cir. 1980) (enjoining claimant from prohibiting public recreational use on his claim; noting that claimant could protest to federal agency and, if unsatisfied, bring lawsuit).

We also agree that 36 C.F.R. § 261.9(a) does not conflict with the mining laws.

This provision is subject to § 261.1(b), which incorporates appellants' statutory rights under 30 U.S.C. § 612. However, although appellants have a right to dispose of vegetative resources where such disposal is "reasonably incident" to their mining operation, they may not exercise that right without first obtaining approval of their operation in the manner specified in 36 C.F.R. Part 228. If appellants believed that their operation required the removal of trees and that the plan failed to accomodate that need, their remedy was to appeal the plan prior to commencing operations. Appellants may not blithely ignore Forest Service regulations and argue afterward that their conduct was reasonable."

Appellants argue, however, that Richardson holds that the government must show that their conduct was unreasonable in order to prohibit it. We disagree. In Richardson, the government filed a civil

action to enjoin the Richardsons from blasting and bulldozing on their mining claims and to require restoration of the surface. The court specifically noted that although "the Secretary of Agriculture has ... authority under sections 478 and 551 of Title 16 to promulgate regulations concerning the methods of prospecting and mining in national forests;... [n]o such regulations were in effect before this lawsuit was commenced." 599 F.2d at 292. In the absence of any regulatory guidance, the court looked directly to 30 U.S.C. § 612 to determine whether the Richardsons' activities were "reasonably incident" to their mining operation. Thus, Richardson held that the Forest Service could enjoin unreasonable mining operations even in the absence of specific regulations. Richardson did not hold that the Service could not enforce a reasonable regulatory scheme requiring mining operators to receive prior

approval before beginning work.

We conclude that the requirement of prior approval does not "endanger or materially interfere with" appellants' mining operations, and that the regulations at issue are therefore consistent with 30 U.S.C. § 612.[3]

II. CONSTITUTIONAL CHALLENGE

A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement. Schwartzmiller v. Gardner, 752 F.2d 1341, 1345 (9th Cir. 1984). "The threshold question in any vagueness challenge is whether to scrutinize the statute for intolerable vagueness on its face or whether to do so only as the statue is applied in the particular case." Id. at 1346.

Where the statute or regulation does not implicate constitutionally protected con-

duct, a facial challenge will succeed "only if the enactment is impermissibly vague in all of its applications." Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982). In such a case, "[a] plaintiff who engages in some conduct which is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypotherical appliations of the law." Id. at 495; see also id. at 500 ("Flipside's ficial challenge fails because ... the ordinance is sufficiently clear as applied to Flipside.")(emphasis added).

In this case, it is clear that no constitutionally protected conduct is implicated, nor is the statute so vague as to specify "no standard of conduct at all." See United States v. Westbrook, 817 F.2d 529, 531-32 (9th Cir. 1987); Schwartz-

miller, 752 F.2d at 1348. Therefore, we need only consider whether the regulations are vague as applied. United States v. Hogue, 752 F.2d 1503, 1504 (9th Cir. 1985).

A. 36 C.F.R. § 261.10(k)

[5] This regulation prohibits "[v]iolating any term or condition of a special-use authorization, contract or approved operating plan." Appellants' claim that the operating plan is ambiguous is without merit. Paragraph IV-A of the plan provides:

> No more than five trenches will be open at one time. However, if a test trench is found to contain mineral value it may be left open to use as a discovery pit. Only one discovery pit per claim will be left open at a time. Discovery pits are excluded as trenches.

The meaning of this provision is crystal clear. The plan, which covers all operations pertaining to six listed claims,

imposes an overall limit of five open trenches for the entire area of exploration. It also allows one open discovery pit (not counted as a trench) for each of the six claims. The provision is not only not vague, it is defined with numerical precision. No reasonable person could construe the plan as allowing more than thirty trenches open simultaneously.

Again, however, appellants rely on 36 C.F.R. § 261.1(b), which states that "[n]othing in this part shall preclude activities as authorized by...the U.S. Mining Laws Act of 1872 as amended." Their contention is that a reasonable person of ordinary intelligence would have believed that he could exceed the operating plan so long as his work was "reasonably incident" to his mining claim. Appellants also rely on 36 C.F.R. § 228.7, which states that a notice of non-compliance will be issued "[i]f an operator fails to comply with...

his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources" (emphasis added). From this, appellants argue that the regulations contemplate conduct which is not in compliance with the operating plan but which is also not unnecessary or unreasonable.

In Hoffman Estates, the Supreme Court listed a number of factors which affect the degree of vagueness which the Constitution tolerates. 455 U.S. at 498-99. First, economic regulation is subject to a less strict vagueness test, because its subject matter is often more narrow and because businesses can be expected to consult relevant legislation in advance of action. The court added that "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." Id. at 498. Second, a stricter vagueness test

applies where criminal penalties are involved. Indeed, although the licensing regulation in Hoffman only imposed civil penalties, the court treated it as "quasi-criminal" because of its prohibitory and stigmatizing effect. Id. at 499-500 & n.16. Third, a scienter requirement may mitigate vagueness, expecially with respect to the adequacy of notice to the complainant. Fourth, a more stringent test is applied when the law threatens to inhibit the exercise of constitutionally protected rights.

Analyzing § 261.10(k) in light of these factors, we conclude that it is not unconstitutionally vague. Although the regulation imposes criminal penalties, in effect it acts as an economic regulation governing the conduct of mining operations on National Forest lands. As with an economic regulation, the subject matter is narrow, and mining operators are not only expected, but required, to obtain advance approval.

Thus, the Doremuses had "the ability to clarify the meaning of the regulation by [their] own inquiry, or by resort to the administrative process." Hoffman Estates, 455 U.S. at 498; cf. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 49 (1966)("we think it plain under our decisions that...the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality."). This ability greatly mitigates the strict liability nature of the offense. Finally, no constitutionally protected rights are implicated in this case. We therefore hold that § 261.10(k) is not unconstitutionally vague as applied.[4]

B. 36 C.F.R. § 261.9(a)

This regulation prohibits "[d]amaging any natural feature or other property of the United States." "Damaging" is defined as "to injure, mutliate, deface, destroy,

cut, chop, girdle, dig, excavate, kill or in any way harm or disturb." 36 C.F.R. § 261.2.

Appellants argue that the definition of "damaging" invites arbitrary and discriminatory enforcement because any entry into a national forest will "disburb" some natural feature. For the reasons outlined above, we decline to address this "facial" argument. As stated by the district court, "[c]ertainly, damage is inflicted when a live tree is destroyed by being pushed over." 658 F.Supp. at 758.

[6] The district court found it equally clear that "live green trees are a feature of nature." Id. We agreed. Appellants argue, however, that the district court failed to consider the effect of a companion regulation, 36 C.F.R. § 261.6(a), which prohibits "[c]utting or otherwise damaging any timber, tree or other forest product, except as authorized by a special use

authorization, timber sale contract, or Federal law or regulation" (emphasis added). We see no inconsistency. § 261.6(a) merely makes explicit the provisio in § 261.1(b), which excepts all activity authorized by Federal law. The flaw in appellant's argument is that 30 U.S.C. § 612 does not authorize mining operators to act without Forest Service approval, and the operating plan did not authorize the cutting of live trees. The plan addresses only small amounts of timber needed for the mining operation; it does not give appellants a blanket license to remove live trees in any manner and quantity which they believe to be reasonable. We therefore conclude that § 261.9(a) is not unconstitutionally vague as applied.

III. CONCLUSION

In summary, we hold that the regulations at issue are consistent with the statutory scheme and are not unconstitution vague.

Appellants' convictions are therefore AFFIRMED.

FOOTNOTES

1. According to the testimony of a Forest Service officer, at least one of the trenches was dug after appellants were issued a notice of non-compliance and ordered to shut down on July 26.

2. David Doremus also contends that appellants attempted on several occasions to appeal Forest Service decisions concerning their plan. The record shows only that appellants sent two letters of complaint to Ron Gardner, a Forest Service official. One of the letters (dated January 18, 1985) was sent prior to the violations complained of, and although the subsequent letter characterized the January 18 letter as an "appeal" and "demanded" that it be processed, nothing in the original letter indicated that it constituted an appeal,

and the Forest Service did not treat it as one. If appellants were dissatisfied with the Forest Service's response, they could have filed an action to compel the Service to process the appeal. See 5 U.S.C. § 706 (1)(1982).

3. Appellants other claims are wholly without merit. First, the magistrate's finding that no oral amendments to the plan were made in 1985, except for an authorization to remove one tree, is not clearly erroneous. Second, the Forest Service Manual merely establishes guidelines for the exercise of the Service's prosecutorial discretion; it does not act as a binding limitation on the Service's authority. Finally, neither the jury trial nor the separation of powers issues were raised below, and we will not consider them for the first time on appeal. Scott v. Pacific Maritime Ass'n, 695 F.2d 1199, 1203 (9th Cir. 1983).

4. Appellants also eontend that the regulation invites arbitrary and discriminatory enforcement because "[t]he prohibited conduct is defined only in the operating plan, which may be unilaterally imposed upon Defendants by the distgrict ranger." Rory Doremus' Opening Brief at 43. We reject this contention. The conditions of the operating plan are subject to negotiation, and the claimant may appeal any decision regarding the plan to the Regional Forester and, if necessary, seek judicial review.

The amici contended that the regulations are invalid under Yick Wo v. Hopkins, 118 U.S. 356 (1886). It is true that the Court in Yick Wo strongly suggested that the ordinances involved there were invalid on their face because they conferred unrestrained discretion to deny a permit. 118 U.S. at 366. However, the Court explicitly chose not to rely on this ground,

relying instead on the fact that the ordinance was discriminatorily applied on the basis of race. Id. at 373-74. There is no suggestion that such is the cause here.

F I L E D
May 29, 1990
Cathy A. Catterson, Clerk
U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 87-3831
Plaintiff-Appellee,	)	
	)	D.C. No. MISC
v.	)	3025-HLR
	)	
RORY DOREMUS and	)	O R D E R
DAVID DOREMUS,	)	
	)	
Defendants-Appellants,	)	
		)

BEFORE: POOLE, CANBY AND LEAVY, CIRCUIT JUDGES.

The motion for additional time to file petition for rehearing filed by appellant RORY DOREMUS is ordered filed.

The petitions for rehearing are DENIED.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	Docket No.
	)	
vs.	)	85-3095-M-01
	)	(F680410)
RORY DOREMUS,	)	
	)	85-3098-M-01
DEFENDANT.	)	(F680411)
	)	

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: 8/4/86, with counsel Donald W. Lojek, 305 W. Fort, Box 1712, Boise, Idaho 83701.

PLEA - Not Guilty

FINDING & JUDGMENT - There being a finding/verdict of GUILTY, Defendant has been convicted as charged of the offense(s) of (F680410) Violating Clause IV-A of an approved operating plan for a mining claim. Keeping more than 5 trenches open. 36 CFR 261.10k; and (F680411) Damaged trees and

surface resources on National Forest Land, thus violating 36 CFR 261.9a.

SENTENCE OR PROBATION ORDER - The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby ordered to pay the sum of $500.00 as restitution and a fine of $45.00 as to each violation and court costs of $25.00 as to each violation for a total of $640.00, all of which shall be paid within thirty (30) days of the date of this judgment, said payment to be made payable to and mailed to the U.S. Department of Justice, Office of the U.S. Attorney, 550 West Fort Street, Boise, Idaho 83724.

COMMITMENT RECOMMENDATION - Pursuant to Rule 7(b) of the Rule of Procedure for the Trials of Misdemeanors before U.S. Magis-

trates, the Defendant may appeal this Judgment of Conviction by filing the appropriate statement with the Clerk of Court within ten (10) days of the entry of this Judgment.

/s/

Stephen M. Ayers,
U. S. Magistrate
Date: 8-5-86

85 3095-M-01

UNITED STATES DISTRICT COURT

VIOLATION NOTICE

1. Record 1(1) - Violation No. (3-9) - F680410

2. Action Code (2)

3. Court Code - 1112

4. Officer's No. - 121

5. Officer's Signature: M.W. Merkley

6. Date: 10/21/85

7. Date of Violation: 07/ /85

8. Violation Code: 26110k

9. Location Name: Sumerod Mine, Wizard and Magic claims

10. RIM or other Code: 28N9E22

11. Violation Description: Violating clause IVA of an approved operating plan for a mining claim keeping more than 5 trenches open. 36 CFR 261.10k

12. Unit Identification:

Region: 11

Forest: 17

District: 05

State: 16

County: 049

13. Resource Damage: [left blank]

14. Property Damage: [left blank]

15. Property Stolen: [left blank]

16. Property Recovered: [left blank]

17. Name: Doremus, Rory

18. Street Address: 114 So. Idaho St.

19. City: Grangeville

20. State: ID

21. Zip Code: 83530

22. Driver's License No.: [blank]

23. State: [blank]

24. Adult/Juvenile: Adult

25. Race: W

26. Sex: Male

27. - 42. [left blank]

43. A. MANDATORY APPEARANCE. If Box A is checked, you MUST appear in court at time and place shown above.

Oct 21 85

The Nez Perce National Forest,

Judicial District, Idaho

Jerry Dombroske, District Ranger for the Red River District, told me that Rory Doremus, during July 1985, did use a backhoe to dig in excess of 5 trenches on National Forest land and that this was in violation of Doremus' approved plan of operations for his mining claim.

Information supplied to me from my fellow officer's observation.

I declare under penalty of perjury that the information which I have set forth above and on the face of the violation notice is true and correct to the best of my knowledge.

Executed this 21st day of Oct. 1985.

/s/

Michael W. Merkley, Special Agent

85 3098-M-01

UNITED STATES DISTRICT COURT

VIOLATION NOTICE

1. Record 1(1) - Violation No. (3-9) - F680411

2. Action Code (2)

3. Court Code - 1112

4. Officer's No. - 121

5. Officer's Signature: M.W. Merkley

6. Date: 10/21/85

7. Date of Violation: 07/ /85

8. Violation Code: 2619a

9. Location Name: Sumerod Mine, Wizard and Magic claims

10. RIM or other Code: 28N9E22

11. Violation Description: Damaging trees and surface resources on National Forest land thus violating 36 CFR 261.9a

12. Unit Identification:

Region: 11

Forest: 17

District: 05

State: 16

County: 049

13. Resource Damage: [left blank]

14. Property Damage: [left blank]

15. Property Stolen: [left blank]

16. Property Recovered: [left blank]

17. Name: Doremus, Rory

18. Street Address: 114 So. Idaho St.

19. City: Grangeville

20. State: ID

21. Zip Code: 83530

22. Driver's License No.: [blank]

23. State: [blank]

24. Adult/Juvenile: Adult

25. Race: W

26. Sex: Male

27. - 42. [left blank]

43. A. MANDATORY APPEARANCE. If Box A is checked, you MUST appear in court at time and place shown above.

Oct 21 85

The Nez Perce National Forest,

Judicial District, Idaho

Jerry Dombroske, District Ranger for the Red River District, told me that Rory Doremus, during July 1985, did damage trees and other surface resources using a back hoe to dig trenches and pits. He went on to tell me that 25 merchantable trees were damaged and 1.25 acres of surface resources were damaged.

Information supplied to me from my fellow officer's observation.

I declare under penalty of perjury that the information which I have set forth above and on the face of the violation notice is true and correct to the best of my knowledge.

Executed this 21st day of Oct. 1985.

/s/

Michael W. Merkley, Special Agent

§ 612. Unpatented mining claims

[a] Propsecting, mining or processing operations

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

[b] Reservations in the United States to use of the surface and surface resources

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent

therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of

that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

[c] Severance or removal of timber

Except to the extent required for the mining claimant's prospecting mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such opeations or uses, or to the extent

authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under subsection (b) of this section. Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

(July 23, 1955, c. 375, § 4, 69 Stat. 368)

FOREST SERVICE MANUAL

UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE

TITLE 2800 - MINERALS AND GEOLOGY

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ZERO CODE

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TITLE 2800 - MINERALS AND GEOLOGY

CHAPTER 2810 - MINING CLAIMS

Most of the public domain lands which became National Forest System lands are subject to location of certain minerals under the mining law of 1872, as amended (30 U.S.C. 21-54). Some of these lands have been withdrawn from entry and location by act of Congress or by administrative action pursuant to an act of Congress or other authority.

This chapter is concerned only with the administration of the laws relative to locatable or hardrock minerals on public domain land. The administration of the mineral leasing laws is covered in FSM 2850 and mineral materials are covered in 1021.

Such mineral and land classifications are defined in FSM 2805, and the principal acts relating to them are listed and discussed in FSM 2801.

2810.1 - Authority. The principal auth-

ority for prospecting for and disposal of public domain hardrock mineral deposits is the 1872 mining law, as amended and supplemented (FSM 2801; 30 U.S.C. 21-54). Basically, the 1872 act provides that valuable mineral deposits in the public domain lands are open to exploration and purchase. The lands in which such deposits are found are open to occupation and purchase. The act of June 4, 1897, extended in general the mining laws to public domain National Forest lands.

2810.4 - Responsibility. The Bureau of Land Management (BLM), as authorized by the Secretary of the Interior, is responsible for administering the general mining laws. However, the memorandum of understanding of April 1957 (FSM 1531.12) between the Bureau of Land Management and the Forest Service provides for joint administration of the mining laws on National Forest System lands. The primary purpose of the agreement

is to ensure efficient coordination between the general surface resource management by the Forest Service and the administration of the mining laws by the BLM. The mining laws are administered through 43 CFR 3000, Minerals Management, and 43 CFR 1800, Public Administrative Procedures. Operations on claims must comply with the surface-management requirements for mining claims set forth in (36 CFR 228 Subpart A).

. . .

2811.5 - Requirements for Valid Mining Claim. The general mining laws impose certain obligations on a claimant who wishes to take advantage of the privileges those laws provide. A claimant must:

1. Discover a valuable deposit (FSM 2815.1, item 1) of a locatable mineral in federally owned public domain land open to the operation of the mining laws. Satisfaction of other requirements of the 1872 act does not make a claim valid absent a

discovery of a valuable deposit.

2. Locate a claim on the valuable deposit.

3. Identify and monument the claim in the manner required by State law.

-4. File in the appropriate office of the Bureau of Land Management a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground. The copy must be filed within 90 days after the date of location of the claim(s).- [*-FSM 2/82 AMEND 20-*]

5. Perform annual assessment work or annual labor worth at least $100 on, or for the benefit of, the claim.

*-6. File a copy of an affidavit of assessment work or notice of intent to hold in the county office where the location notice or certificate is recorded.

7. File in the appropriate office of the Bureau of Land Management a copy of the affidavit of assessment work or notice of intent to hold. The copy must be filed by December 30 of each year following the calendar year in which the claim was located.-* [*-FSM 2/82 AMEND 20-*]

With the fulfillment of these requirements, a claimant obtains a valid mining claim. So long as such conditions continue to exist, the claimant is entitled to possession of the claim for mining purposes. It is optional with the *-claimant whether to apply for patent. Patent procedures and-* requirements, are described in FSM 2815. [*-FSM 2/82 AMEND 20-*]

The term "valid claim" often is used in a loose and incorrect sense to indicate only that the ritualistic requirements of posting of notice, monumentation, discovery work, recording, annual assessment work, payment of taxes, etc., have been met. This

overlooks the basic requirement that the claimant must discover a valuable mineral deposit. Generally, a valid claim is a claim that may be patented.

Although the statues require the discovery of a valuable mineral deposit prior to the location of a claim, the courts and the Department of Interior have recognized a right of possession, in the absence of the discovery required by statute, if the claimant is diligently prospecting. The Forest Service recognizes this principle, and in keeping with the policy of encouraging bona fide prospecting and mining, will not discourage or unduly hamper these activities. Rather, the Forest Service should aid the legitimate activities of a prospector making bona fide efforts to obtain a discovery on a good prospect. On the other hand, the Forest Service should oppose attempts by prospectors to build permanent structures, cut

timber, build or maintain roads, unless authorized by special use permit or approved operating plan.

A mining claim may lack the elements of validity and be invalid in fact, but it must be recognized as a claim until it has been finally declared invalid by the Department of the Interior or Federal courts.

A claim unsupported by a discovery of a valuable mineral deposit is invalid from the time of location, and the only rights the claimant has are those belonging to anyone to *-enter and prospect on National Forest lands.-* [*-FSM 2/82 AMEND 20-*]

. . .

1. Right to exclusive possession and occupancy for mining purposes, including control of the surface. Permission must be obtained from the claimant to cross the claim with a road. The Forest Service must obtain claimant's permission to harvest timber from the claim, except for removal

of dead or diseased trees which constitute a menace to the Forest.

2. Right to cut timber on the claim to use for mining purposes and to provide clearance required to conduct mineral operations.

3. Right to remove timber for conversion to lumber to be used for mining purposes, provided that the same species and substantially equivalent volume is returned for use on the claim or group of claims from which it was cut.

4. Right to sell or otherwise dispose of timber required to be cut in conducting actual mining of the mineral deposits or for clearing for surface facilities needed for mining or processing of the mineral, provided that the rate of cutting is with equal pace to the actual mining or need of surface facilities.

5. Right to cut timber from a millsite for building milling or mining facilities

on the millsite.

-2813.13b - Claims Validated Subsequent to Act of 1955. Such claims which otherwise come under 30 U.S.C. 612 carry the- same surface rights as above, except for the following modifications: [*-FSM 2/82 AMEND 20-*]

1. Right to occupancy and use necessary for prospecting, mining, and processing, but not the exclusive right to the surface. Lands containing such claims are subject to the rights of the United States to manage and dispose of the vegetative resources, to manage other resources except locatable minerals, and to the right of the United States, its permittees and licensees, to use so much of the surface area necessary for such purposes and for access to adjacent lands.

2. Right to cut timber on the claim for mining uses and for necessary clearing, except that timber cut in the process of

necessary clearing cannot be sold by the claimant. The United States has the right to dispose of timber and other vegetative resources.

3. Right to additional timber required for mining purposes, if timber was removed from the claim by the Forest Service after claim location. The quantity and kind of timber to be provided, free of charge from the nearest available source which is ready for harvesting, will be substantially equivalent to that previously removed from the claim.

2813.14 - Right of Access to Claim. The right of reasonable access for purposes of prospecting, locating, and mining is provided by statute. Such access must be in accordance with the rules and regulations of the Forest Service. However, the rules and regulations may not be applied so as to prevent lawful mineral activities or to cause undue hardship on bona fide prospec-

tors and miners.

. . .

2814.24 - Provide Reasonable Alternatives. Forest officers should provide bona fide prospectors and miners reasonable alternative access routes, exploration methods, special use permits, and operating plan provisions in order that they may carry out necessary mineral associated activities without violation of laws and regulations.

. . .

2817.02 - Objectives. In managing the use of the surface and surface resources, the Forest Service should attempt to minimize or prevent, mitigate, and repair adverse environmental impacts on National Forest System surface and cultural resources as a result of lawful prospecting, exploration, mining, and mineral processing operations, as well as activities reasonably incident to such uses. This should be accomplished by imposition of reasonable

conditions which do not materially interfere with such operations.

2817.03 - Policy. The primary means for obtaining protection of surface resources should be by securing the willing cooperation of prospectors and miners. The willingness of the majority of prospectors and miners to comply with regulations, reasonably administered, is a principal key to the protection of environmental quality in the National Forest System. Face-to-face dialog with operators is encouraged.

-However, when reasonable efforts have been made to obtain compliance with the regulations and the noncompliance is unnecessarily or unreasonably causing injury, loss, or damage to surface resources, enforcement action will be taken. (See FSM 2817.3(5).) [-FSM 8/83 AMEND 24-*]

The Forest Service is not authorized to manage locatable mineral resources in National Forest System lands. The Forest

Service is, therefore, not directly concerned with methods and techniques of prospecting, exploration, mining or mineral processing, except to the extent that certain methods and techniques can have greater or lesser environmental impacts.

The regulations shall be administeered in a fair, reasonable, and consistent manner and not as a means of inhibiting or interfering with legitimate, well-planned mineral operations.

These regulations apply to all unpatented millsites, tunnel sites, and mining claims, including those not subject to 30 U.S.C. 612, and to activities, primarily prospecting, which may be conducted under the mining laws but not on claims.

The provisions of the regulations for operating plans will not be used as means of solving existing trespass and *-unauthorized occupancy problems (FSM 2818) on lands clearly open to location under the

1872 mining law.-* [*-FSM 2/82 AMEND 20-*]

The statutory right of the public to prospect, develop, and mine valuable minerals, and to obtain a patent, will be fully honored and protected. Proprietary information relating to those rights and obtained through the administration of these regulations will be protected to the full extent authorized by law.

. . .

2817.3 - Inspection and Noncompliance

1. Under Approved Operating Plan. When activities are being conducted under an approved operating plan, regular compliance inspections must be conducted to ensure reasonable conformity to the plan and to guard against unforeseen detrimental effects. The frequency, intensity, and complexity of inspection shall be commensurate with the potential for irreparable and unreasonable damage to surface resources.

2. Without Operating Plan. When operations are being conducted without an operating plan because it was determined none was required, the need for regular inspections shall be determined on a case-by-case basis. Timely inspections shall help assure conformance to the environmental protection requirements of the regulations, as well as identify operations that vary from those described in the notice of intention and which may require an operating plan.

-3. Detection. Forest officers shall make note of, and report all operations for which there have not been submitted either notices of intention to operate or operating plans. Such operations shall be identified and inspected as soon as practicable to determine if a plan of operations or a notice of intent is required.- [*-FSM 8/82 AMEND 24-*]

4. Inspector Qualifications. Inspection

shall be conducted by Forest officers who are familiar with the equipment and methods needed to find and produce minerals and who can accurately assess the significance of surface resource disturbance. Inspectors should be capable of identifying those activities of an operator which are reasonably necessary to the operation, which ones could pehaps be done differently with less effect on surface resources without endangering or hindering the operation, and which ones are unreasonable or unnecessary.

5. Noncompliance. Wherever practicable, acts of noncompliance should be discussed with the operator, either in person or by telephone in an attempt to secure willing and rapid correction of the noncompliance. Such discussions shall be made a matter of record in the operator's case file. Where the operator fails to take prompt action to comply and the noncompliance is unnecessarily or unreasonably causing injury,

loss or damage to surface resources, the *-authorized officer must take prompt non-compliance action. For direction to resolve unauthorized residential occupancy on mining claims. See FSM 2818.

a. Notice of Noncompliance. The first step in any noncompliance action is to serve a written notice of noncompliance to the operator or the operator's agent, in person, by telegram, or by certified mail. This notice must include a description of the objectionable or unapproved activity, an explanation of what must be done to bring the operation into compliance, and a reasonable time period within which compliance must be obtained. Continued refusal of the operator to comply after notice will usually require enforcement action.

b. Enforcement Action. Civil or criminal enforcement, or a combination of both, are available for enforcement of 36 CFR

228. The decision on which procedure, or combination, to use shall depend upon the particular facts in each case and the probability of success and possible consequences. The Regional mineral staff or the local Office of General Counsel shall be consulted for advice prior to any enforcement action to ensure consistency and conformance with mineral law and regulation. The appropriate U.S. Attorney shall be consulted to coordinate the criminal and civil actions.-* [*-FSM 8/82 AMEND 24-*]

*-(1) Civil Action. Two types of civil relief in Federal District Court are available: damage recovery and injunctive. An action to recover costs of repairing damages or to compensate for irreparable damages would be appropriate for those cases where such damages have already occurred and no further operations were being conducted or likely to be conducted. Such damage suits require extended periods

of time for completion. Injunction relief can be obtained quickly when the facts of a particular case warrant such action. There must be strong justification that the party requesting relief is suffering or will suffer irreparable harm and that harm must usually be incompensible. Moreover, it must be likely that the complainant will actually succeed on the merits of the case.

(2) Criminal Action. In cases where unnecessary and unreasonable damage is occurring and where reasonable attempts fail to obtain an operating plan or to secure compliance with an approved operating plan, the operator may be cited for violation of the appropriate section of 36 CFR 261 or 262, according to existing delegation of authority.-* [*-FSM 8/82 AMEND 24-*]

Forest Service, USDA

§ 228.7 Inspection, noncompliance.

(a) Forest Officers shall periodically inspect operations to determine if the operator is complying with the regulations in this part and an approved plan of operations.

(b) If an operator fails to complay with the regulations or his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources the authorized officer shall serve a notice of noncompliance upon the operator or his agent in person or by certified mail. Such notice shall describe the noncompliance and shall specify the action to comply and the time within which such action is to be completed, generally not to exceed thirty (30) days: Provided, however, That days during which the area of operations is inaccessible shall not be included when

computing the number of days allowed for compliance.

. . .

PART 261 - PROHIBITIONS

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AUTHORITY: 30 Stat. 35, as amended (16 U.S.C. 551); sec. 1, 33 Stat. 628 (16 U.S.C. 472); 50 Stat. 526, as amended (7 U.S.C. 1011, (f); 82 Stat. 916 (16 U.S.C. 1246, (i); 92 Stat. 1650 as amended (16 U.S.C. 1133 (c)-(d)(1)).

SOURCE: 42 FR 2957. Jan. 14, 1977, unless otherwise noted.

Subpart A - General Prohibitions

§ 261.1 Scope.

(a) The prohibitions in this part apply,

except as otherwise provided, when:

(1) An act or omission occurs in the National Forest System or on a Forest development road or trail.

(2) An act or omission affects, threatens, or endangers property of the United States administered by the Forest Service.

(3) An act or omission affects, threatens, or endangers a person using, or engaged in the protection, improvement or administration of the National Forest System or a Forest development road or trail.

(4) An act or omission occurs within the designated boundaries of a component of the National Wild and Scenic Rivers System.

(b) Nothing in this part shall preclude activities as authorized by the Wilderness Act of 1964 or the U.S. Mining Laws Act of 1872 as amended.

[42 FR 35958, July 13, 1977, as amended at

43 FR 32136, July 25, 1978; 46 FR 33519, June 30, 1981]

. . .

§ 261.1b Penalty.

Any violation of the prohibitions of this part (261) shall be punished by a fine of not more than $500 or imprisonment for not more than six months or both pursuant to Title 16 U.S. Code section 551, unless otherwise provided.

[42 FR 33519, June 30, 1981]

§ 261.2 Definitions.

The following definitions apply to this part:

"Archaeological resource" means any material remains of prehistoric or historic human life or activities which are of archaeological interest and are at least 50 years of age, and the physical site, location, or context in which they are found.

"Campfire" means a fire, not within any building, mobile home or living accom-

modation mounted on a motor vehicle, which is used for cooking, personal warmth, lighting, ceremonial, or esthetic purposes. "Fire" includes campfire.

"Camping" means the temporary use of national Forest System lands for the purpose of overnight occupancy without a permanently-fixed structure.

"Camping equipment" means the personal property used in or suitable for camping, and includes any vehicle used for transportation and all equipment in possession of a person camping. Food and beverage are not considered camping equipment.

"Damaging" means to injure, mutilate, deface, destroy, cut, chop, girdle, dig, excavate, kill or in any way harm or disturb.

"Developed recreation site" means an area which has been improved or developed for recreation.

"Forest development road" means a road

wholly or partly within or adjacent to and serving a part of the National Forest System and which has been included in the Forest Development Road System Plan.

"Forest development trail" means a trail wholly or partly within or adjacent to and serving a part of the National Forest System and which has been included in the Forest Development Trail System Plan.

. . .

§ 261.9 Property.

The following are prohibited:

(a) Damaging any natural feature or other property of the United States.

(b) Removing any natural feature or other property of the United States.

(c) Damaging any plant that is classified as a threatened, endangered, sentitive, rare, or unique species.

(d) Removing any plant that is classified as a threatened, endangered, sentitive, rare, or unique species.

(e) Entering any building, structure, or enclosed area, owned or controlled by the United States when such building, structure, or enclosed area is not open to the public.

(f) Using any pesticide except for personal use as an insect repellent or as provided by special-use authorization for other minor uses.

(g) Digging in, excavating, disturbing, injuring, destroying, or in any way damaging any paleontological, prehistoric, historic, or archaeological resource, structure, site, artifact or property.

[46 FR 33520, June 30, 1981, as amended at 9 FR 25450, June 21, 1984]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. RORY DOREMUS and DAVID DOREMUS, Defendants/Appellants,	CASE NO. MS 3025 OPINION

I. FACTS

This is an appeal by Rory and David Doremus from their convictions after court trial before United States Magistrate Stephen M. Ayers. Both appellants were charged and convicted of violating 36 C.F.R. § 261.10(k) by exceeding the terms of an approved operating plan for a mining claim by keeping more than five trenches open as provided by the plan and for violating 36 C.F.R. § 261.9(a) by damaging trees and surface resources on National Forest land. Title 36 C.F.R. § 261.10(k) (1986) prohibits "[v]iolating any term or

condition of a special-use authorization, contract or approved operating plan." Title 36 C.F.R. § 261.9(a) (1986) prohibits "[d]amaging any natural feature or other property of the United States."

The appellants staked mining claims in the Red River Ranger District of the Nez Perce National Forest in the early 1970's. Since that time, the appellants have conducted mining operations on these claims under Forest Service approved operating plans. Operating plans are provided for pursuant to 36 C.F.R. §§ 228.1 through 228.63. Criminal charges for violation of these regulations is authorized by 16 U.S.C. § 551.

An operating plan for the year 1985 was signed by Appellant Rory Doremus and the District Ranger for the Red River Ranger District of the Nez Perce National Forest. The 1985 operating plan was drafted to incorporate changes from the 1984 operating

plan requested by Appellant Rory Doremus as well as other provisions distinct from the 1984 operating plan. A portion of the plan provides in paragraph IV-A that no more than five trenches will be open at one time. This limitation was proposed by the appellants. Paragraph IV-A also limits the exploration to the clearcut area. Other paragraphs dealing with acceptable uses and practices with respect to timber include prohibition against use of live green trees for firewood and camp construction, and that all timber requirements be met by the use of small dead timber. The plan requires that all amendments be in writing. The District Ranger, or a designated representative authorized to approve amendments, is located approximately seven miles from the defendants' claims.

The trial court found that the appellants dug trenches and did excavation work outside the area of exploration and that on

July 31, 1985, there were in excess of thirty trenches open, some of which were larger than the prescribed size. The trial court further found that the appellants had pushed over trees in excess of the authority allowed. Other activities in excess of the operating plan were noted by the trial court. On July 18, 1986, the trial court entered its memorandum opinion, concluding that both apellants were guilty as charged beyond a reasonable doubt.

II. ISSUES PRESENTED FOR APPEAL

In their reply brief, the appellants note the issues presented for appeal as:

> 1. Whether the regulations upon which conviction was predicated are []void for vagueness, and hence violative of the Due Process clause of the Constitution.
>
> 2. Whether the evidence is sufficient to support the convictions.

Appellants' Reply Brief, filed March 24,

1987, at 2. Finally, throughout the briefing is a general discussion of what appellants contend is a conflict between the regulatory scheme and the statutory pronouncements. In essence, appellants contend that the proclamations of Congress demand deference to reasonable activities of miners and that if one looks to this for analysis, the activities of the appellants must be tested under a general reasonableness standard. Appellants argue that if their conduct was reasonable, despite the operating plan, then they cannot be convicted. Regulations which make that reasonable conduct illegal must fall in the shadow of the statutes. This "issue" will be addressed first and the understanding of the statutory and regulatory scheme set forth in that analysis will provide the basis for analysis of all issues raised on appeal.

III. STANDARD OF REVIEW

Actual findings of the trial court which have been expressed in findings of fact and conclusions of law are subject to a clearly erroneous standard of review. United States v. Bautista, 509 F.2d 675 (9th Cir. 1975). Questions of law are subject to de novo review. United States v. Nance, 666 F.2d 353 (9th Cir. 1982); United States v. Moreno-Pulido, 695 F.2d 1141 (9th Cir. 1983). When mixed questions of fact and law are presented, the standard of review turns upon whether the court sees the factual matters or the legal matters as predominant. United States v. Owens, 789 F.2d 750 (9th Cir. 1986).

IV. ANALYSIS

A. Statutory and Regulatory Scheme

The Surface Resources Act of 1955, 30 U.S.C. § 612, acknowledges a right of the United States to manage and dispose of the vegetative surface resources surrounding

mining claims, but posits that any liita-tions of the surface of a mining claim by the United States shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto. United States v. Richardson, 599 F.2d 290 (9th Cir. 1979). Under the same statute, miners have a right to remove timber when it is reasonably incident to the mining operation. The National Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21, and the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732, recognize the often times competing, but equally important, policies of fostering mining exploration and development and protecting the environment. A balancing of these competing interests is required. United States v. Richardson, 599 F.2d 290 (9th Cir. 1979); United States v. Weiss, 642 F.2d 296 (9th Cir. 1981).

Title 36 C.F.R. § 261, et seq., has been promulgated by the Secretary of Agriculture under authority of the Organic Administration Act of June 4, 1897, specifically, 30 Stat. 35 and 35 (Oct. 23, 1962), 16 U.S.C. §§ 4787 and 551. These provisions are part of the statutory scheme which covers the National Forests and which confers administration of the National Forests upon the Secretary of Agriculture. See 16 U.S.C. §§ 471-583(i). Under Sections 478 and 551, the Secretary may make rules and regulations for the protection and preservation of the National Forests, and all persons entering upon that land must comply with the rules and regulations. United States v. Weiss, 642 F.2d 296 (9th Cir. 1981); United States v. Richardson, 599 F.2d 290 (9th Cir. 1979).

The Secretary of Agriculture is, then, given the directive to promulgate regulations to implement the policies recognized

by Congress. While the Secretary of Agriculture does not have the authority to regulate mining per se, when mining activity disturbs National Forest land, regulation is appropriate. United States v. Goldfield Deep Mines Company of Nevada, 655 F.2d 1307 (9th Cir. 1981), cert. denied, 455 U.S. 907 (1982). Regulatory schemes are necessary to provide some definition to the broad policy statements of Congress and establish a give-and-take system wherein the pristine state of the environment is compromised in favor of promoting mining concerns and at the same time reigning in unbridled upset of the environment and its ecological systems by miners. In other words, mining exploration and development is to be encouraged and promoted, but reasonable regulations are tolerated to protect the environment.

Laws and regulations must be sufficiently definite when regulating conduct, expe-

cially where providing criminal sanctions, so that a person of reasonable intelligence, exercising common understanding and practice, receives a fair and reasonable warning of that which is proscribed. United States v. National Dairy Products Corp., 372 U.S. 29 (1963); Winters v. New York, 333 U.S. 507 (1948); Schwartzmiller v. Gardner, 752 F.2d 1341 (9th Cir. 1984).

Title 30 U.S.C. § 612 suggests that activities reasonably incident to mining operations must be tolerated. It does not, however, provide in any specific terms what is or is not reasonably incident to mining operations. It is left to the Secretary to draft regulations within the framework dictated by Congress to balance the competing interests of the miners and the environment and to provide definition to what is and is not considered reasonable.

The regulations, in and of themselves and through the vehicles they employ, must

make the laws of Congress fact specific so as to provide adequate notice of expected conduct and withstand a vagueness challenge. Necessarily, each mining operation and the environment which contains it will vary as to needs and circumstances. The drafters of the statutes and regulations cannot and need not foresee, delineate and proscribe conduct for each and every circumstance or set of circumstances. The court in United States v. Weiss, 642 F.2d 296 (9th Cir. 1981), noted that each mining operation must be evaluated independently. The court recognizes that the nature of the activity prohibits statutory and regulatory drafters from writing with specificity. The mechanism approved by the Weiss court for detailing for each operation the conduct, tailored to each operation, deemed reasonable under the circumstances is the operating plan. See 36 C.F.R. § 228 (1986).

The purpose of the operating plan is to provide definition to the statutory and regulatory terms "reasonable" and "significant." The operating plan, then, becomes the definition of what is reasonable. The operating plan is the vehicle employed by the regulations to make the statutes and regulations sufficiently fact specific to notify the reasonable person of the conduct contemplated. The outer reaches of the terms of the operating plan are the outer reaches of what is reasonable under the circumstances of the specific mining operation.

The miner agrees to confine his operations to the terms of the operating plan. The miner must sign the plan. The miner has input into the terms of the plan and, in fact, is the first to suggest what the scope of his operations will be so that they can be provided for in the plan. Since the operating plan itself becomes the defi-

nintion of what is reasonable and significant conduct under the circumstances, operating outside the terms of the operating plan vehicle violates the plan and is unreasonable.

It is agreed by all that even the plan itself cannot be drafted so as to foresee and proscribe conduct for every situation which may arise as mining takes place. In recognition of this problem, amendments may be obtained.

In summary, in this area Congress has provided broad policy statements recognizing the competing interests of mining operations and the environment. Congress has directed the Secretary of Agriculture to draft regulations which do not materially interfere with miing operations and the reasonable incidents thereto, but which, at the same time, protect the environment from unbridled destruction. The regulations drafted by the Secretary cannot

contemplate or define what is reasonable conduct with respect to mining under all circumstances. With this in mind, the regulations provide for a vehicle by which representatives of the Secretary, together with the mining operator, define what is reasonable under the circumstances attendant the specific mining operation. This vehicle is the operating plan. The regulations of the Secretary also provide that violation of this plan is prohibited, since such action would be unreasonable under the circumstances. 36 C.F.R. § 261.10(k). Conduct which is violative of the operating plan violates the regulatory scheme and the statutory scheme.

The regulations also prohibit certain other conduct such as damaging natural features or property of the United States. 36 C.F.R. § 261.9(a). Therefore, those regulations which can prohibit conduct under any factual circumstances, together

with the operating plan, provide the miner with a description of that conduct which is acceptable under the circumstances and that conduct which tips the scales to the detriment of the environment.

In this case, the appellants have argued that the regulations conflict with the pronouncements of Congress, particularly 30 U.S.C. § 612. The court finds no such conflict. The statute provides for limited regulation of the mining activities on National Forest land in the interest of the protection and preservation of the National Forests. As stated in United States v. Richardson, 599 F.2d 290 (9th Cir. 1979), that regulatory right is limited so as not to endanger or materially interfere with mining operations.

Appellants have argued that their actions were reasonable and so in conformance with 30 U.S.C. § 612. Appellants contend that since they are in conformance

with the requirements of 30 U.S.C. § 612, any regulation which deems that same action unreasonable and illegal is contrary to the statute and must fall in deference to the statute. However, the definition of reasonable as contemplated by the statute is found in the regulatory scheme incorporating the operating plan.

B. Vagueness

Appellants have asserted that the regulations upon which their convictions are based, 36 C.F.R. § 261.10(k) and 36 C.F.R. § 261.9(a), are vague both facially and as applied. The requirement that criminal statutes be specific in the conduct they forbid is founded on principles of due process. A person of reasonable intelligence, exercising common understanding and practice, must be provided fair and reasonable warning of that which the law proscribes. United States v. National Dairy Products Corp., 372 U.S. 29 (1963). Absent

a question of first amendment freedoms, the statute or regulation is examined in the light of the facts of the case at hand. United States v. Louderman, 576 F.2d 1383 (9th Cir. 1978).

1. Title 36 C.F.R. § 261.10(k)

Initially, appellants rather weakly attempt to suggest to this court that their activities in workking their mining claims were not significant disturbances of surface resources and, therefore, did not even require the existence of an operating plan. This argument was not raised below, the evidence is quite to the contrary, and the appellants had operated under an operating plan for several years prior to 1985 and had signed and acknowledged the terms of the 1985 operating plan. Appellants cannot argue that an operating plan should not have been developed to guide their conduct for the first time on appeal. In any event, the trial court's finding that a valid

operating plan was in existence for the year 1985 is supported by the record and the admissions of the appellants.

The next question which should be addressed is whether amendments were made to the operating plan. The trial court found that oral amendments had been made to operating plans for years prior to 1985. This trial court found that the 1985 operating plan required all amendments to be in writing and that no written amendment was made to the operating plan. The trial court's findings regarding amendments to the plan are substantiated by the record and any conflicting evidence was a matter for the trier of fact to determine. This court holds that the trial court's factual findings are supported by the record and are upheld.

The trial court found that on July 31, 1985, in excess of thirty trenches were open at the mining site. The trial court

concluded that the appellants had violated the terms of the operating plan by keeping more than five trenches open on July 31, 1985. A portion of the plan provides in paragraph IV-A that no more than five trenches will be open at one time. The trial court found that 36 C.F.R. § 261.10 (k) was certainly clear on its face and as applied.

Facially, 36 C.F.R. § 261.10(k) prohibits violating a term or condition of an operating plan. Looking merely at the regulation itself, without for the moment considering the operating plan, the regulation is clear on its face. Appellants state that absent any requirement of intent, the regulation is impermissibly vague in any application, because it makes no reference to matters reasonably related to effectuation of mining laws, nor is there provision within Section 10(k) for description of prohibited conduct by any authorized

legislative or regulatory body. The analysis of the statutory and regulatory scheme set forth above sounds the death knell for his argument. The regulation does, in fact, refer to matters reasonably related to effectuation of mining laws when one realizes that the operating plan defines those matters reasonably related to effectuation under the circumstancs. Similarly, a description of the prohibited conduct is the essence of the operrating plan and the statutes authorize the Secretary of Agriculture to provide regulations and vehicles and to designate representatives to tailor and to limit conduct under the circumstances of each case. The court finds that 36 C.F.R. § 261.10(k) is clear on its face and that a de novo review mandates upholding the trial court's determination.

Appellants have also asserted that 36 C.F.R. § 261.10(k) is void for vagueness as applied to the facts of this case. The

trial court found that maintaining more than five open trenches clearly violated the terms of the operating plan and that the operating plan was itself specific enough so as not to succumb to a challenge for vagueness.

Appellants have, for the first time on appeal, and without any mention of such interpretation in the record, suggested to this court that the condition that only five trenches remain open could reasonably be interpreted so that the phrase "at one time" implies a reasonable period of time to leave trenches other than five active trenches open while assay results are being obtained and reclamation work is finished. The court cannot find that this argument was raised below. In any event, such an assertion flies in the face of the clear language of the operating plan. The plan provides for no more than five trenches to be open at one time. The plan does provide

for test trenches. The language of the operating plan could not be more clear. Five trenches is all that is allowed and no more. The plan does not refer to five active trenches, or five active trenches and trenches to be reclaimed, or five active trenches and test trenches and trenches to remain open while assay results are being obtained. The plan states, five trenches. Appellants stretch credulity in asserting the interpretation for the first time on appeal. The court holds that 36 C.F.R. § 261.10(k) clearly sets forth the proscribed conduct under the facts of this particular case, the trial court's conclusions are not clearly erroneous, and even a de novo review of this mixed question of law and fact results in a conclusion that the statute is not void for vagueness and the trial court properly so held.

2. Title 36 C.F.R. § 261.9(a).

The appellants have challenged this

regulation as being vague on its face. Title 36 C.F.R. § 261.9(a) prohibits "damaging any natural feature or other property of the United States." Title 36 C.F.R. § 261.2 states that "[d]amaging means to injure, mutilate, deface, destroy, cut, chop, girdle, dig, excavate, kill or in any way harm or disturb." The term "natural feature" is not defined in the regulation. Forester Ronald Allen Gardner testified at the trial that "natural feature" would be any feature present in nature such as trees, rock outcrops, soils and water.

The trial court found that the vagueness challenge to 36 C.F.R. § 261.9(a) was somewhat more troublesome than the challenge to 36 C.F.R. § 261.10(k). However, the trial court found that the regulation is sufficiently clear so that an ordinary person, exercising ordinary common sense, can sufficiently understand and comply with it.

The court found that there is no doubt that the appellants damaged the natural features of the environment with their trenching, destruction of trees and other excavation work.

The regulation's definition of "damaging" is as would be expected from a dictionary definition. The definition parallels a common sense, everyday definition of "damaging." Plaintiff argues that the definition is overbroad and could include bending a blade of grass on National Forest land. The argument is too abstract to be relevant to the challenge to the regulation as being vague on its face. The term "damaging" is defined and provides reasonable notice of what is proscribed.

The appellants have argued that the term "natural feature" is not defined and provides insufficient notice as to its meaning. Common sense suggests that natural would be the opposite of unnatural or manmade. The

environment and all of its features or elements unaffected by intrusion by man is the broad picture. The material aspects such as trees, rocks, soil and water are the features of nature. The court finds nothing vague about this common sense definition. Upon de novo review, the court has determined to uphold the conclusion of the trial court that 36 C.F.R. § 261.9(a) is not unconstitutionally vague on its face.

The appellants have also challenged 36 C.F.R. § 261.9(a) as being vague as applied to the case. The violation is the destruction of live trees. The trial court found that trees had been pushed over on or before July 30, 1985, in excess of the authority of the plan. The trial court concluded that the appellants had damaged natural features by pushing over trees. The trial court found the regulation to be sufficiently clear both on its face and as applied to withstand constitutional

challenge.

Appellants make reference to pushing over a tree. However, the exhibits show that numerous live trees were knocked over or bulldozed down. Certainly, damage is inflicted when a live tree is destroyed by being pushed over. Equally certain, live green trees are a feature of nature. The regulation, as applied to this case, is not vague. The situation in this case involves the bulldozing of numerous live trees, not the bending of a blade of grass or accidental or incidental knocking over of one tree.

The challenge should also be reviewed with respect to the operating plan. The situation under the regulations with respect to miners is different from that with respect to others. Miners are statutorily given more rights to alter the environment, but are also, as noted above, limited. The limitation is embodied in the operating plan.

In this case, the operating plan states that all timber requirements are to come from small dead trees. The operating plan states that the area of exploration and trenching is to be confined to the clearcut area. Appellants did not confine themselves to the clearcut area, but instead went into the wooded area and knocked down live trees.

Appellants argue that the operating plan does not expressly state that trees cannot be knocked over. Appellants argue that in following the contours of the land or a significant vein, the trenching may zigzag and a small tree may get into the way. Appellants argue that it is reasonable to destroy the tree. This argument was made below to the trial court. However, as noted above, what is reasonable under the circumstances of this mining operation is spelled out in the operating plan. Appellants cannot look solely to the satutes and prey on the word "reasonable." The operat-

ing plan rovides for written amendment and an agent authorized to make such written amendment is available within seven miles of the claims of the appellants. Authorization to exceed the clearcut area or remove live trees could have been sought viz the amendment process. It was not.

Appellants' argument that it is unreasonable to make them stop operating and get an amendment to move a small tree is inapposite on this appeal. That argument should have been addressed when the operating plan development was in progress. Furthermore, it does not appear to be unreasonable to seek amendment to the operating plan when it appears that operations need to go outside of the clearcut area, necessarily involving the destruction of live trees.

The regulation prohibits damaging natural features. As found by the trial court, numerous trees were not just trimmed or nicked by a bulldozer, but pushed over.

This act was outside of the operating plan and was unreasonable under the circumstances. The conduct prohibited by regulation, under the circumstances of this case, was clearly dictated and clearly exceeded. The court holds that upon full review, the finding of the trial court that 36 C.F.R. § 261.9(a) is not unconstitutionally vague as applied to this case, is correct and is upheld.

C. Sufficiency of Evidence

Appellants have argued that insufficient evidence was produced below to sustain their convictions. Specifically, appellants again argue that their conduct was reasonable and, therefore, in accord with 30 U.S.C. §§ 612 and 613. Appellants argue that the government put on no evidence of the reasonableness of their actions. However, as addressed above, the operating plan defines the extent of reasonableness under the circumstances. Not only was there

abundant evidence to show that more than five trenches were open and that features of nature, i.e., live trees, were damaged, but that this was done in violation of the operating plan. The evidence regarding the damaging of natural features should find some guidance from the operating plan as discussed above. The evidence in the record clearly shows that natural features of the environment were damaged. Clear and convincing evidence supports the trial court's findings and conclusions and conviction of the appellants. They will not be upset on appeal.

The decision of the magistrate and the convictions are, in all respects, AFFIRMED.

DATED this 21 day of April, 1987.

/s/

HAROLD L. RYAN
UNITED STATES DISTRICT JUDGE

USDA - FOREST SERVICE

NEZPERCE NATIONAL FOREST

RED RIVER RANGER DISTRICT

ELK CITY, IDAHO 83535

(208/842-2255)

PLAN OF OPERATION NO. 05-72083

This Plan of Operations, including all provisions made herein, meeting requirements under 36 CFR 228.4, are approved and mutually agreed upon by the UNITED STATES OF AMERICA, acting through the USDA - FOREST SERVICE, NEZPERCE NATIONAL FOREST, RED RIVER RANGER DISTRICT and RORY DOREMUS.

This plan consists of seven divisions: I. GENERAL INFORMATION, II. PRINCIPLES, III. PROPERTY OR AREA, IV. DESCRIPTION OF OPERATIONS, V. MITIGATION MEASURES, VI. RECLAMATION, and VII. ACKNOWLEDGEMENTS together with vicinity and Project Area Maps, Drawings and Specifications for Developments (if any), and such attachements as may be provided for herein.

Upon satisfactory compliance with the terms of this Plan of Operation, your reclamation bond will be returned to you. No refund will be made until compliance with these measures has been satisfactorily completed. The required reclamation bond for this operation is based on the items listed in Section V. MITIGATION and VI. RECLAMATION enclosed and THE RECLAMATION BOND WORKSHEET attached and made a part of this Plan of Operation.

UNITED STATES OF AMERICA

By /s/ _____ 5/15/85
Jerry Dombrovske Date
/s/ District Ranger
Title

RORY DOREMUS _____

By /s/ _____ May 13, 1985
Date

/s/ Super.
Title

I. GENERAL INFORMATION

This is an lode claim and mill operation originally proposed on Jan. 21, 1985, which follows the previous Plan of Operations Number 05-72038 dated August 31, 1984.

This operation consists of the Wizard and Magic claim groups.

A. Dates of Operation

Initial start up	May 1985
Seasonal start up	May 1985
Seasonal shutdown	Oct 1, 1985
Final project completion and reclamation	Unknown

II. PRINCIPALS

A. Operation and Ownership

The following people will be associated with the activities conducted under this plan:

Name	Address	Phone	Status
Rory Doremus	114 So. Idaho Street Grangeville, ID 83530	208/983-1158	1/2 Owner

David Doremus 1/2 Owner
3575 Cahuenga Blvd. West
Suite 125
Los Angeles, CA 90068

Authority to Obligate Resources of the Corporation

Individuals authorized to enter into and execute any contract, undertaking, authorization, letter of intent, understanding, or approval, with the United States Forest Service on behalf of the Company shall be identified on a written and notorized Delegation of Signature Authority.

A. Operation Representative

Unless the operator is notified in writing otherwise, the District Ranger is the Forest Service Representative to 1) receive notices, 2) take action in regard to the approved Plan, and 3) be readily available to the area for assistance and consultation.

When operations are in progress, the operator shall have a representative

named in writing, readily available to the area of the operation and authorized to receive notices in regard to performance under the Plan.

III. Property or Area

A. Claim Identification and Location

All operations covered under this plan will be associated with the following claims:

Claim Name	IMC Number	Legal Description
Wizard #1	72083	NE¼, Sec. 27, T28N, R9E
Wizard #2-5	62526-62529	SW¼, Sec. 23, T28N, R9E
Magic	86160	SW¼, Sec. 23, T28N, R9E

Map

A vicinity map of this operation is attached and made part of this plan.

IV. DESCRIPTION OF THE OPERATIONS

A. Synopsis of the Operation

The activities covered under this plan are for the exploration and development of a lode ore deposit. The exploration

activity will be conducted with a loader dozer. A small mill, floation cells, and table separation device will be used to extract gold from the ore. A settling pond will be used in conjunction with the mill. Ore will be stockpiled next to existing cabin and the pulp from the mill will be stockpiled on the old log landings and could be used in reclamation of the test holes.

The area of exploration will be concentrated to the clear cut. Exploration area is designated on attached map. The size of the test trenches will be approximately 10' x 30'. Topsoil will be removed and piled separately from other overburden and used for final reclamation. No more than five trenches will be open at one time. However, if a test trench is found to contain mineral value it may be left open to use as a discovery pit. Only one discovery pit per

claim will be left open at a time. Discovery pits are excluded as trenches. Operator will reclaim all disturbed areas.

B. Equipment to be used:

a. A dozer will be used for trenching, mining, & reclamation.

b. The milling process includes a impact mill, jaw crusher, floation cells, and a separation table.

c. Two four wheel pickups

d. A pump will be used to pump water to a holding tank

1. Surface disturbances:

Map No.	Description	Size
1	A small mill & table separation device with a settling pond	125' x 125'
	Period of Disturbance: May 1985 - Continuing	
2	Camp trailer	50' x 50'
	Period of Disturbance: May 1985 -	

Continuing

3 Stockpiles of ore & pulp 50' x 50'

Period of Disturbance: May 1985 - Continuing

4 Exploration of vein/Less than ¼ acre

Period of Disturbance: May 1985 - October 1985

5 Road #9516 12' x 1/2 mile

Period of Disturbance: May 1985 - Continuing

C. Map

A map showing the location where all planned activities will be conducted is attached and made part of this plan.

D. Operational Components

1. Access Route, Road Construction, Road Maintenance

The operator is authorized to use existing System Roads and other means of access subject to rules and regulations established by the Forest Service. When commercially

hauling of ore or other products originating from this operation, the Operator shall perform or pay for road maintenance commensurate with Operator's use on roads controlled by the Forest Service. Where reasonable access to the operations is not provided by existing System Roads that are open to the general public, said access may be authorized by Road Use Permit or approved Plan of Operations. No construction or improvement of roads, trails, bridges or any other means of access shall be used until approved in writing by the authorized officer except as specified in this Plan.

a. Access Route

Roads #1183 and #9516 shall be used throughout the operation. Drainage structures shall be constructed in the existing

claim access road, #9516. Maintenance of Road #9516 and #1183, commensurated with use, shall be in accordance with c. Road Maintenance.

b. Road Control Devices

The operator is required to maintain road closure devices on roads closed to public use but approved for use in this plan. The location of the road closure device is shown on the Project Area Map. If the Alpine Group does not fix the road closure device this season, operator will be liable to fix it.

c. Road Maintenance

Road maintenance is the preservation of the road facility including surface, shoulders, miscellaneous structures, drainage, sight distance, and all

such traffic control devices required to ensure safe and efficient use by established road users and adequately protect adjacent resources. Operator's maintenance responsibility shall cover the before, during, and after operation period during any year when operations and road use are performed under the terms of the Plan of Operations.

Operator shall perform road maintenance work, commensurate with Operator's use, on roads controlled by Forest Service and used by Operator in connection with this operation.

All maintenance work shall be done currently, as necessary, in accordance with specifications set forth herein or attached

hereto, except for agreed adjustments.

Specifications applicable to roads used by Operator are as follows:

Maintenance Specification No.

Road #	T-101	T-108	T-301	T-310	T-619	T-710
#9516	X	X	X	X	X	X
#1183	X	X	X	X	X	X

d. Temporary Road and Trail Construction

The location and clearing widths of all Temporary Roads or facilities shall be agreed to before construction is started.

e. Temporary Road and Trail Maintenance

Operator shall perform or pay for raod and trail maintenance work, commensurate with Operator's use, on roads and trails controlled by Forest

Service and used by Operator in connection with this operation. The road or trail will be maintained in a condition equal to that of the road or trail immediately prior to use. Unless otherwise agreed, leadoff drainage and water barriers to prevent erosion will be constructed on the road as directed by the Forest Service.

2. Facilities

a. Site Plan

Attached maps show the location of all buildings, service areas, roads, and structures. No construction shall be undertaken by the Operator prior to site plan approval.

b. Area Maintenance

The area will be maintained to present a clean, neat, and

orderly appearance. Trash, debris, unuseable machinery, improvements, etc., will be disposed of currently.

3. Hazardous Materials

a. Storage

Storage of fuel, and lubricants will be necessary on the project area. This storage shall be as specified below in Prevention of Oil Spills.

b. Prevention of Oil Spills

If Operator maintains storage facilities for oil or oil products (gasoline) on Project Area, Operation shall take appropriate preventive measure to insure that any spill of such oil or oil products does not enter any stream or other waters of the United States or any of the individual States.

Oil or oil products shall not be stored within 150 feet of any stream or other waters.

Oil or oil products remaining after the operation shall be removed from National Forest Lands.

If the total oil or oil products storage exceeds 1320 gallons or if any single container exceeds a capacity of 660 gallons, Operator shall prepare a Spill Prevention Control and Countermeasures Plan. Such plan shall meet applicable EPA requirements (40 CFR 112) including certification by a registered professional engineer.

4. Safety

The Operator's operations shall facilitate Forest Service's safe and practical inspection of Operator's

operations and conduct of other official duties on the Project Area. Hazardous sites or conditions shall be marked by signs, fenced, or otherwise identified to protect the public. The following precautions to provide for public safety shall be taken:

a. Existing mine shafts shall be fenced or fences repaired.

b. Portals shall be equipped with doors or other devices, capable of preventing unauthorized access.

5. Solid Wastes

a. Material Disposal

Waste material removed from operations shall be deposited such that no sediment shall enter any stream and so it can be used in the reclamation of area disturbed. Pulp from the

milling operation should be stockpiled on the logging landings.

6. Structures and Occupance

a. Structures

No structures shall be built or maintained in the area of use or adjacent areas unless expressly permitted, in writing, by the authorized Forest Officer.

The existing cabin on the Wizard claim will be used for the housing of the mill and table. Tools and supplies will be stored in tool shed. Personal conducting the operations under this plan will be living on the site in a trailer.

b. Use of the Premises

The following conditions will apply when camping on National Forest Land:

1. Pit toilet.

(a) Hole deep enough to meet the demands of the camp.

(b) Daily use of lime in the hole.

(c) Hole enclosed by a tarp, plastic or other suitable material.

(d) Not within 100 feet of a live stream or draw.

(e) If needed, insect and/or fly control.

(f) At the end of the operation, structures will be removed, holes filled and surrounding area returned to its natural state.

2. Garbage.

(a) Put in an enclosed container or plastic bags.

(b) No garbage thrown around the camp area.

(c) Will be hauled weekly to a landfill dump.

(d) If needed, fly control.

3. Firewood

(a) No live, green trees will be cut or cut into (chopped).

(b) The inspector will designate wood that can be used.

4. No vehicle will be parked blocking a main road or access road.

5. Camp area will be as small as possible and not spread out over a large area.

6. No green trees will be used in camp construction unless designated by the inspector.

7. When removing camp, all garbage and other material

used in camp will be removed from campsite and placed in a landfill dump.

8. Area will be returned to near natural state.

9. Poles used in camp construction will be stacked.

c. Year-Round Occupancy

No year-round occupancy of the area and adjacent areas will be allowed unless permitted in writing by the Forest Service.

d. Garbage-Refuse

The Operator shall pack out or otherwise remove from National Forest land all unburnable refuse resulting from operations under this plan.

7. Timber

Timber requirements are small for this operation at this time. If timber is needed operator is asked

to cut small dead timber.

a. Slash Disposal

Slash consists of all woody material standing or down resulting from Operator's activities that exist on the project area and is not utilized in the mining operation. Operator shall treat or dispose of slash on project area in accordance with the following specific requirements:

Any slash from the cutting of mine timbers shall be knocked down to the ground and scattered.

Unless otherwise agreed in writing, Operator shall keep slash disposal work current with timber cutting.

8. Water Requirements

The water source will be from

Streckner creek and will supply the mill operation and campsite. Approximately 1,000 gallons per week will be needed to run the mill operation.

V. MITIGATION MEASURES

A. Cultural Resources

The operator shall cease operations and immediately notify the Forest Service Representative upon the discovery of any cultural or natural history resource within the area covered by this Plan.

B. Erosion Prevention and Control

Operator's activities shall be conducted reasonably to minimize soil erosion. Equipment shall not be operated when ground conditions are such that excessive damage will result. The kinds and intensity of erosion control work done by Operator shall be adjusted to ground and weather conditions and the need for controlling runoff. Erosion control work shall be kept current after

October 1 of each year.

If Operator fails to do seasonal erosion control work prior October 1, Forest Service may temporarily assume responsibility for the work and any bond hereunder may be used by Forest Service to do the work. If needed for such work, Operator shall make additional deposits on request by Forest Service.

1. Erosion Control Seeding

Following completion of annual mining activity but no later than October 1, areas of exposed raw soil on areas disturbed by the operation shall be scarified, seeded, and fertilized as needed. Soil on areas to be seeded shall be left in a roughened condition favorable to the retention and germination of the seed.

The amount, rate, species mixture, and kind of fertilizer shall be

approved by the Forest Service prior to use. Seed and fertilizer shall be spread evenly at the rate approved. When fertilizer and seed are applied in separate operations, the second operation shall be carried out within 72 hours of the first. Application shall be during the period September 15 to October 1 unless otherwise approved by the Forest Service. No application work shall be done during extremely windy or rainy weather, or when the ground is frozen or otherwise unsuitable.

C. Fire Prevention and Control

Operations shall comply with all applicable Federal and State fire laws and regulations. All reasonable measure to prevent and suppress fires on the area of operations shall be taken by all employees, contractors, and subcontractors.

1. Normal Fire Precautions

Specific fire precautionary measures are set forth below. Upon request of Forest Service, Operator shall permit and assist in periodic testing and inspection of required fire equipment. Operator shall promptly remedy deficiencies found through such inspecting and testing.

a. Fire-Tool Caches

During the fire season, as determined by the Forest Service, the Operator shall furnish and maintain in serviceable condition a fire-tool box and fire tools to be used only for suppression of forest fires. The toolbox shall be located at the site and will contain the following tools:

One - Axe, double bit 3½#

Two - Shovels (round point #0 lady or equal)

Two - Pulaskis

One - fire extinguisher, dry chemical type of not less than 5 pound capacity with 10 A.B.C. or higher rating.

b. Spark Arrester and Engine Mufflers

A muffler or spark arrester satisfactory to the Forest Service shall be maintained on the exhausts of all trucks and tractors or other internal combustion engines used in connection with this operation.

c. Smoking

Smoking shall not be permitted within Project Area except on surfaced or dirt roads, within closed vehicles, in camps or at other posted places. Smoking shall not be permitted while working or traveling on foot,

within or through Project Area.

d. Debris Around Buildings
The grounds around buildings, tents, and other structures shall be kept free of flammable material for a distance of at least 15 feet from the wall of such structures.

e. Storage of Petroleum and Other Highly Inflammable Products Gasoline, oil, grease, or other highly flammable material shall be stored either in a separate building, or at a site where all combustible debris and vegetation is cleared away within a radius of 25 feet. Fire extinguishers and/or sand barrels may be required at such locations specified by Forest Service, when unusually hazardous conditions exist.

f. Campfires

Fires shall not be built outside the designate bivouac areas without the specific approval of the Forest Service.

2. Fire Prevention and Suppression

The Operator shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of the Forest Service to prevent and suppress fires on or near the Project Area.

3. Emergency Precautions

Forest Service may require the necessary shutting down of all or portions of Operator's activities based on predicted fire weather changes.

D. Fisheries and Wildlife

All practicable measures shall be taken to maintain and protect fisheries and wildlife habitat which may be affected by the operations.

1. Protection of habitat of Endangered Species

Measures to protect special areas needed by plants or animals listed as threatened or endangered under the Endangered Species Act of 1973 are as follows:

All personnel associated with the operation shall be informed that wolves may be present, that they are an endangered species, and that they are protected by law.

If protection measures prove inadequate, if other such areas are discovered, or if new species are listed on the Endangered Species

List, Forest Service may suspend this operation until a modification is approved to provide additional protection regardless of when such facts become known. Discovery of such areas by either party shall be promptly reported to the other party.

E. Scenic Values

Operations shall harmonize with the scenic values, to the extent practicable, through such measures as the design and location of operating facilities, including roads and other means of access, vegetative screening of operations, and construction of structures and improvements which blend with the landscape.

F. Solid Wastes

Operations shall comply with applicable Federal and State standards for the disposal and treatment of solid wastes.

All garbage, refuse, or waste, shall either be removed from National Forest lands or disposed of or treated so as to minimize its impact on the environment and the forest surface resources. All tailings, dumpage, deleterious materials, or substances and other wastes shall be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the environment and forest surface resources.

G. Water Quality

Operations shall comply with applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended.

1. Streamcourse Protection

Unless otherwise agreed, the following measures shall be observed to protect all streamcourses:

a. Opeator's activities shall

be conducted to prevent debris from entering streamcourses, except as may be authorized under paragraph c. In event Operator causes debris to enter streamcourse in amounts which may adversely affect the natural flow of the stream, water quality, or fishery resource, Operator shall remove such debris as soon as practicable, but not to exceed 48 hours, and in an agreed manner that will cause the least disturbance to streamcourses.

b. Wheeled or track-laying equipment shall not be operated in streamcourses except at crossings designated by Forest Service or as approved elsewhere in this Operating Plan.

c. Flow in streamcourses may be

diverted only if such diversion is necessary for approved mining activities, Forest Service gives written authorization, and Operator has an approved Stream Alteration Permit from the Idaho Department of Water Resources.

VI. RECLAMATION

Upon exhaustion of the mineral deposit or at the earliest practicable time during operations, or within one year of the conclusion of operations, unless a longer time is allowed by the authorized officer, operator shall reclaim the surface disturbed in operations by taking such measures as will prevent or control onsite and off-site damage to the environment and forest surface resources.

A. Roads

Unless otherwise approved by the authorized officer, roads no longer needed for operations:

1. Shall be closed to normal vehicular traffic.

2. Bridges and culverts shall be removed.

3. Cross drains, dips, or water bars shall be constructed.

4. The road surface shall be shaped to as near a natural contour as practicable and be stabilized.

B. Other Disturbed Areas

All other disturbed areas shall be reshaped to approximately the same original controu and revegetated. Erosion control measures shall be taken to prevent any sediment from entering streams.

B. Revegetation

Within two years after reclamation 40-50% of the ground should be covered with grass and trees native to the area.

VII. ACKNOWLEDGEMENTS

A. Bonds

A bond in the amount needed to perform

the reclamation and mitigation work for the entire project may be required before the Plan of Cperation is approved. The value of the bond may be ajusted, subject to Forest Service approval, to an amount needed to reclaim existing disturbances and the next season's proposed work as identified in the attached reclamation bond worksheet.

B. Cessation of Operations

Unless otherwise agreed to by the authorized officer, operator shall remove within one year following cessation of operations all structures, equipment, and other facilities, and clean up the site of operations. Other than seasonally, where operations have ceased temporarily, a statement shall be filed with the District Ranger which includes:

1. Verification of intent to maintain the structures, equipment, and

other facilities,

2. The expected reopening date, and

3. An estimate of extended duration of operations.

A statement shall be filed annually in the event operations are not reactivated. The operating site, structures, equipment, and other facilities shall be maintained in a neat and safe condition during nonoperating periods.

C. Claim Ownership

Approval of this Plan of Operations does not constitute certification or recognition of ownership to any person named herein. When another party asserts a title interest in the area covered by this Plan, it will be the sole responsibility of the concerned parties to resolve such conflict before proceeding with claim development.

D. Claim Validity

Approval of this operating plan does not

constitute now or in the future recognition of or certification of the validity of any mining claim to which it may relate or to the mineral character of the land on which it lies.

E. Noncompliance

Operator's failure to comply with the approved Plan invalidates the Plan and may result in the suspension of all or part of the operation. Notification of noncompliance and all necessary action on the part of the operator to return to compliance shall be provided in writing by the Forest Service to the operator. The Forest Service may elect to use the Reclamation Bond to restore resources disturbed by the unauthorized activity.

F. Notices

Notices by either party shall be in writing to the other party's designated representatives.

1. Site inspections conducted by

the Forest Service shall be documented on the Minerals Plan of Operations Inspections Report (Form R1-FS-111-2800-8) with a copy provided to the operator in the field.

G. Plan Revision

Should the nature of the operation change, a modified or supplemental plan may be required. The Plan of Operation may be amended at any time subject to the approval of the Forest Service. Proposed revisions must be in writing and must reference the applicable section of the current approved Plan. Where appropriate, the map should also be amended.

Supreme Court, U.S.
FILED
DEC 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 90-453 and 90-466

In the Supreme Court of the United States

OCTOBER TERM, 1990

RORY DOREMUS, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID DOREMUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the prosecution of petitioners for violating Forest Service regulations in the course of mining their unpatented claims on federal lands violated their rights under federal mining statutes or the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-453

RORY DOREMUS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 888 F.2d 630.[1] The opinion of the district

[1] "Pet. App." refers to the appendix to the petition in No. 90-453.

court (Pet. App. 80a-111a) is reported at 658 F. Supp. 752. The magistrate's opinion, Memorandum Opinion, Nos. 85-3095-M-01 to 85-3098-M-01 (D. Idaho June 18, 1986), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1989. The petitions for rehearing were denied on May 29, 1990. Pet. App. 30a. The petition for a writ of certiorari was filed on July 27, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial before a United States magistrate, petitioners, who are brothers engaged in prospecting on unpatented mining claims, were convicted of damaging natural features on national forest service land, in violation of 36 C.F.R. 261.9(a),[2] and of deviating from their mine operating plan, in violation of 36 C.F.R. 261.10(k).[3] Each defendant was ordered to pay $500 in restitution, $90 in fines, and $50 in court costs. Pet. App. 32a. The district court and the court of appeals upheld both convictions.

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[2] 36 C.F.R. 261.9(a) provides in part as follows:

> The following are prohibited:
>
> (a) Damaging any natural feature or other property of the United States.

36 C.F.R. 261.2 defines "damaging" as "to injure, mutilate, deface, destroy, cut, chop, girdle, dig, excavate, kill, or in any way harm or disturb."

[3] 36 C.F.R. 261.10(k) provides in part as follows:

> The following are prohibited:
>
> * * * * *
>
> (k) Violating any term or condition of a special use authorization, contract or approved operating plan.

1. The surface effects of operations on unpatented mining claims in the national forests are subject to regulation by the Forest Service of the Department of Agriculture. The Act of June 4, 1897, ch. 2, 30 Stat. 35, codified at 16 U.S.C. 478 (known as the Organic Administration Act of 1897), authorizes entry into national forests for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," subject to "rules and regulations" promulgated by the Secretary of Agriculture.[4] See *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 582 (1987).

In 1955, Congress amended the Act of May 10, 1872, ch. 152, § 1, 17 Stat. 91, codified at 30 U.S.C. 22 *et seq.* (known as the Mining Act of 1872), by enacting Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, codified at 30 U.S.C. 611-615 (known as the Multiple Surface Use Act of 1955). Section 3 clarified the general right of entry for mining activity in national forests by providing for "conservation and utilization of timber, forage, and other surface resources on mining claims, and on adjacent lands." H. R. Rep. No. 730, 84th Cong., 1st Sess. 8 (1955). Congress expressly reserved the federal government's right "to manage and dispose of the vegetative surface resources * * * and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)" on unpatented mining claims located after July 23, 1955. 30 U.S.C. 612(b); see also *United States* v. *Richardson*, 599 F.2d 290, 293-295 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). The 1955 Act further provides that no use of the surface resources

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[4] The Organic Administration Act originally delegated authority over the national forests to the Secretary of the Interior. In 1905, that authority was transferred to the Secretary of Agriculture. Act of Feb. 1, 1905, § 1, 33 Stat. 628, 16 U.S.C. 472.

by the government or its permittees may "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." See 30 U.S.C. 612(b); see also Section 612(c) (permitting severance or clearance of timber if "reasonably incident" to mining operations).[5]

2. In 1977, the Secretary of Agriculture promulgated regulations governing public use of land administered by the Forest Service. See 36 C.F.R. Pt. 261. The regulations include prohibitions against "[d]amaging any natural feature or other property of the United States," 36 C.F.R. 261.9(a), and against "[v]iolating any term or condition of a special-use authorization, contract or approved operating plan," 36 C.F.R. 261.10(k). Violation of one of the prohibitions in Part 261 is punishable by a fine of up to $500, imprisonment for up to six months, or both. 16 U.S.C. 551; 36 C.F.R. 261.1(b).

The operating plans referred to in 36 C.F.R. 261.10(k) are governed by 36 C.F.R. Pt. 228. These regulations provide that no work on an unpatented mining claim that is

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[5] On the specific subject of timber cutting, Section 612(c) of 30 U.S.C. provides that:

> Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under subsection (b) of this section. Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

likely to cause a "significant disturbance of surface resources" shall proceed without an approved operating plan. 36 C.F.R. 228.4(a). Before beginning work of that nature, a miner must submit for approval by the District Ranger of the Forest Service a proposed plan that describes the scope of the intended activity and proposed measures to minimize environmental harms. 36 C.F.R. 228.4(c), 228.8. All mining operations must conform to the terms of the plan, 36 C.F.R. 228.4(b), 228.5(a), which is subject to modification at the request of the claimant according to procedures prescribed by regulation. See 36 C.F.R. 228.4(d)-(e); see also *United States* v. *Brunskill*, 792 F.2d 938, 940 (9th Cir. 1986); *United States* v. *Goldfield Deep Mines Co.*, 644 F.2d 1307 (9th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

3. In 1972, petitioners staked a series of mining claims in the Red River Ranger District of the Nez Perce National Forest in central Idaho. Magistrate's Memorandum Opinion, Nos. 85-3095-M-01 to 85-3098-M-01 (D. Idaho June 18, 1986), slip op. 2 [hereinafter Mag. Op.]. The two petitioners worked the claims every year between 1972 and 1985. Except in the first few years, they mined under an approved operating plan. The 1985 operating plan was signed by Rory Doremus and the District Ranger in May 1985. *Ibid.*

The 1985 plan described the scope of the authorized exploration. See Pet. App. 115a. The plan provided for modification or supplementation in the event that the nature of the operation changed, and it stipulated that requests for amendments to the plan were to be submitted in writing and approved by the Forest Service before petitioners deviated from the operating plan in any way. *Id.* at 147a. After the plan had been signed, petitioners orally requested certain amendments, but none relevant to the

charges here was granted. *Id.* at 3. Petitioners did not appeal the denials of their requests.[6]

The operating plan stated that, for each of petitioners' six claims, "[n]o more than five trenches will be open at one time," excluding one "discovery pit"—a trench in which potentially valuable mineral deposits are found in the course of mining. Pet. App. 115a-116a. It prohibited "construction or improvement of roads, trails, bridges or any other means of access"—including "Temporary Roads"—without prior written approval. *Id.* at 118a, 121a. The plan also prohibited the cutting of "live, green trees" for firewood; any firewood was to be obtained from trees designated by a Forest Service inspector. In addition, "[n]o green trees [were to] be used in camp construction unless designated by the inspector." Pet. App. 128a. The plan also stated that "[t]imber requirements are small for

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[6] Rory Doremus and Forest Service employee Ronald Gardner gave inconsistent testimony as to whether Gardner ever purported to grant oral modifications of the operating plan. Compare Mar. 14, 1986 Tr. 19-20, 127-128 (testimony of Ronald Gardner), with *id.* at 129-132 (testimony of Rory Doremus). The magistrate found that "no amendments were ever agreed to by the Forest Service, and no amendments, either verbal or in writing, ever occurred." Mag. Op. 3.

The court of appeals ruled that "the magistrate's finding that no oral amendments to the plan were made in 1985, except for an authorization to remove one tree, is not clearly erroneous." Pet. App. 27a. The court of appeals' suggestion that the Forest Service purported to grant an oral modification with respect to a single tree appears to be based on Gardner's testimony that he designated a tree for removal after Rory Doremus expressed concern that it could fall into an adjacent mining pit. See Mar. 14, 1986 Tr. 126-128. The court of appeals did not discuss whether Gardner's action could have come within his authority under the plan to designate trees for use as firewood. See Pet. App. 127a. It also did not discuss whether any oral modification could have been effective in view of the plan's requirement that requests for amendments and any approvals of those requests be in writing.

this operation at this time. If timber is needed operator is asked to cut small dead timber." *Id.* at 129a. The plan did not otherwise address the clearance of trees from prospecting sites.

4. In late July 1985, Forest Service officials conducted several inspections of petitioners' operations. Mag. Op. 3-4. The inspections revealed that several trees had been pushed over and that a road had been constructed through the trees on one side of the claim. Mag. Op. 4; Pet. App. 7a, 82a-83a, 104a. The Forest Service also found more than 30 open trenches. Mag. Op. 3-4; Pet. App. 7a, 83a. All told, petitioners' operations had damaged surface resources covering about 1.25 acres of the national forest, which far exceeded the roughly .25 acre of surface damage authorized in the operating plan. Mag. Op. 4.

On October 21, 1985, each petitioner was issued two violation notices, one for damaging trees and other natural features in violation of 36 C.F.R. 261.9(a), and one for opening more trenches than permitted under the operating plan, in violation of 36 C.F.R. 261.10(k). Pet. App. 34a-39a.

5. Petitioners contested the charges against them in proceedings before a United States magistrate, which included a trial and extensive post-trial briefing. Before the magistrate, petitioners argued, *inter alia,* that the regulations and operating plan taken together were unconstitutionally vague, both facially and as applied; that the regulations and operating plan violated their statutory right to mine; that the United States had failed to prove the charges beyond a reasonable doubt; that the 1985 operating plan was procedurally defective because the Forest Service had "unilaterally imposed" changes in the plan proposed by petitioner; and that, even if valid, the operating plan had been modified by an oral agreement

authorizing the conduct in question. Petitioners' Post-Trial Br. 1-24; Petitioners' Post-Trial Reply Br. 1-7.

The magistrate rejected petitioners' contentions. The magistrate found that Sections 261.9(a) and 261.10(k) were neither vague nor indefinite on their face or as applied to this case, Mag. Op. at 5; that the regulations and operating plan did not impose unreasonable restrictions on petitioners' statutory rights to exploit mineral deposits on public land, *id.* at 6-7; that the United States had proved the violations charged beyond a reasonable doubt, *id.* at 7-8; that the defendants had agreed to the operating plan as written, *id.* at 7; and that "no amendments, either verbal or in writing, ever occurred," *id.* at 3.

6. Petitioners appealed the magistrate's ruling to the district court, reiterating the arguments that the regulations they were charged with violating were unconstitutionally vague and that those regulations as well as the restrictions contained in the operating plan violated their statutory rights. The district court upheld the magistrate's decision. Pet. App. 80a-111a. The court rejected petitioners' contention that miners can defend against prosecution under Forest Service regulations by attempting to establish that their conduct, although damaging to surface resources and inconsistent with their operating plans, is "reasonably incident" to mining operations. The court explained that the operating plan regulations, 36 C.F.R. Pt. 228, had been promulgated "within the framework dictated by Congress to balance the competing interests of the miners and the environment and to provide definition to what is and is not considered reasonable." Pet. App. 89a. Operating plans, the court explained, "provide the miner with a description of that conduct which is acceptable under the circumstances and that conduct which tips the scales to the detriment of the environment." *Id.* at

93a-94a.[7] The court also held that the regulations at issue—36 C.F.R. 261.9(a) and 261.10(k)—were not unconstitutionally vague on their face or as applied. Pet. App. 95a-108a. It also affirmed the magistrate's finding that the government had proved violations of both regulations beyond a reasonable doubt. *Id.* at 108a-109a.

7. On appeal, petitioners renewed the arguments that the district court had rejected. David Doremus also repeated arguments concerning Forest Service coercion and oral modifications that had been made to the magistrate but abandoned in the district court. The court of appeals affirmed the judgment of the district court. Pet. App. 1a-29a.

The court of appeals rejected petitioners' assertion that their statutory right to mine on public land shielded them from prosecution for violating the conditions of their operating plan. Specifically, the court held that both Section 261.9(a) and Section 261.10(k), as applied to peti-

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[7] The court explained (Pet. App. 92a-93a):

> [I]n this area Congress has provided broad policy statements recognizing the competing interests of mining operations and the environment. Congress has directed the Secretary of Agriculture to draft regulations which do not materially interfere with mining operations and the reasonable incidents thereto, but which, at the same time, protect the environment from unbridled destruction. The regulations drafted by the Secretary cannot contemplate or define what is reasonable conduct with respect to mining under all circumstances. With this in mind, the regulations provide for a vehicle by which representatives of the Secretary, together with the mining operator, define what is reasonable under the circumstances attendant the specific mining operation. This vehicle is the operating plan. The regulations of the Secretary also provide that violation of this plan is prohibited, since such action would be unreasonable under the circumstances. * * * Conduct which is violative of the operating plan violates the regulatory scheme and the statutory scheme.

tioners' conduct, were consistent with the mining laws, including 30 U.S.C. 612, which permits miners to make uses of surface resources that are "reasonably incident" to the mining operation. Pet. App. 12a-17a. The court stated that "[t]he regulatory scheme of requiring a notice of intent to operate and approval of an operating plan is a reasonable method of administering the statutory balance between the important interest[s] involved here [which] were intended to and can coexist." *Id.* at 13a (internal quotation marks omitted). The court explained that "[t]he purpose of requiring prior approval is to resolve disputes concerning the statutory balance *before* operations are begun, not after." The court added that if petitioners were unsatisfied with the conditions in their operating plan, "they could have appealed to the Regional Forester under 36 C.F.R. § 228.14 (1987)." Pet. App. 13a.

The court also rejected petitioners' vagueness challenge to Sections 261.9(a) and 261.10(k). Pet. App. 17a-25a. In particular, the court disagreed with petitioners' contention that the pertinent statutory provisions and regulations could be read to permit conduct that is not in compliance with an operating plan but is nevertheless "reasonably necessary" to a mining operation.[8] The court noted that petitioners could easily have "clarif[ied] the meaning of the regulation[s]"—including the relationship among all the regulations and statutory provisions on which they rely—"by [their] own inquiry, or by resort to the administrative process." Pet. App. 23a. With respect to 36 C.F.R. 261.10(k), which prohibits deviation from an

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[8] That contention was based in part on the language of 36 C.F.R. 261.1(b), which states that "[n]othing in this part shall preclude activities as authorized by" the Mining Act as amended, and the language of 36 C.F.R. 228.7, which states that a notice of noncompliance will issue "[i]f an operator fails to comply with * * * his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources." See Pet. App. 20a-21a.

operating plan, the court found that the regulation was not vague as applied to petitioners because the plan was "crystal clear" in prohibiting the simultaneous opening of more than five trenches on petitioners' claim. Pet. App. 19a-20a. With respect to the other challenged regulation, 36 C.F.R. Section 261.9(a), which prohibits "[d]amaging any natural feature or other property of the United States," the court found that the regulation was sufficiently precise to give petitioners notice that the regulation covered their actions in "destroying [or] push[ing] over" live trees.[9]

ARGUMENT

1. Petitioners contend that the 1985 operating plan imposed limitations on their mining activities that should be held unenforceable in light of their rights under federal mining statutes. Petitioners also appear to suggest that the scope of the regulatory prohibitions under which they were convicted should be viewed as circumscribed by their right to conduct activities on their claims that are "reasonably incident" to mining, see 30 U.S.C. 612, and that their activities satisfied that statutory standard.[10]

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[9] The court also rejected petitioner David Doremus's contention that the magistrate's factual findings concerning oral amendments to the plan were in error. Pet. App. 27a. The court did not explicitly address the claim that the brothers had been coerced to agree to the plan, but it did recite the magistrate's factual finding that petitioners had proposed the limits on the number of trenches that were incorporated in the plan. *Id.* at 7a. The court refused to consider constitutional arguments alleging violations of the separation of powers and the right to a jury trial, which were raised for the first time on appeal. *Id.* at 27a.

[10] Rory Doremus, the petitioner in No. 90-453, seeks review only of his conviction under Section 261.9(a). David Doremus, the petitioner in No. 90-466, seeks review of both of his convictions.

The court of appeals properly rejected these arguments. As the courts below observed, the Forest Service regulations are designed to give content to the statutory concept of activity "reasonably incident" to mining. The regulations authorize the Service to determine what conduct is "reasonably incident" to mining in each case, and they provide a mechanism for ensuring that mining activities conform to that standard by requiring the submission and approval of an operating plan before mining activities may commence. This regulatory scheme contemplates that claimants who are dissatisfied with proposed restrictions in their plans, or who believe that those restrictions infringe their statutory rights, will challenge their plans before the agency at the approval stage or formally seek an amendment of the plan. See Pet. App. 13a (the regulatory requirement that miners seek approval of their operating plans is intended "to resolve disputes concerning the statutory balance *before* operations are begun not after"). Petitioners took neither of those steps; instead, they agreed to the plan. Mag. Op. 2.[11] By doing so, petitioners failed to take advantage of available administrative remedies, thereby forfeiting the right to challenge the

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[11] Petitioners could have filed an appeal of the restrictions on the number of open trenches in their plan with the Regional Forester under 36 C.F.R. 228.14 (1987). (Current appeal procedures appear at 36 C.F.R. Pt. 251, Subpt. C.) See Pet. App. 13a-15a; 26a-27a. The Regional Forester's decision would have been reviewable under the Administrative Procedure Act, 5 U.S.C. 702(a). See Pet. App. 13a, citing *Sabin* v. *Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975) (APA review of Forest Service decision to deny special use permit).

Petitioners did request some oral amendments to their plan, which the Forest Service denied. Petitioners, however, failed to seek review of those denials under the APA. In any event, petitioners' operating plan provided that any requests for amendments to the plan were to be in writing.

terms of the plan. See *McKart* v. *United States*, 395 U.S. 185, 194-195 (1969).

The requirement that litigants exhaust available administrative remedies rather than challenge administrative action in litigation is not confined to situations where the governing statute expressly requires exhaustion. See *Glass Packaging Inst.* v. *Regan*, 737 F.2d 1083, 1093 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984); *American Iron & Steel Inst.* v. *EPA*, 526 F.2d 1027, 1050-1051 (3d Cir. 1975). Nor is it confined to situations where the option of pursuing the administrative process to completion remains open at the time the litigation begins. See *McKart*, 395 U.S. at 194-195. To be sure, whether the requirement of exhaustion applies in a particular case depends on the administrative scheme at issue and the factual context. See *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *McKart*, 395 U.S. at 193. Where, as here, enforcement of the exhaustion requirement forecloses a possible defense to criminal liability, the governmental interest in adherence to the doctrine must outweigh the burden placed on the criminal defendant. See *McKart*, 395 U.S. at 197; *Yakus* v. *United States*, 321 U.S. 414 (1944). The reasons for requiring exhaustion in this case, however, are quite compelling. Operating plans embody the informed judgment of the Forest Service as to the level of surface damage that is reasonably incident to a particular mining operation. The exercise of agency expertise to develop concrete, site-specific standards that balance conflicting statutory goals of mineral development and national forest preservation would be circumvented if miners could "blithely ignore Forest Service regulations and argue afterward that their conduct was reasonable." Pet. App. 15a. The case for requiring exhaustion of administrative remedies is particularly compelling when the immediate basis for liability is

not simply a generally applicable regulation, but an operating plan that has been specifically designed for a particular individual and with which that individual has agreed to comply.

2. Petitioners argue (90-453 Pet. 26-27; 90-466 Pet. 15) that their convictions violate the due process requirement that criminal offenses be defined with sufficient clarity to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954).

Contrary to petitioners' contention, the regulations provided fair warning that petitioners' activities were unlawful. Section 261.9(a) prohibits the "damaging" of "any natural feature" within the national forest without authorization, and "damaging" is defined to include cutting or excavating. 36 C.F.R. 261.2. Petitioners' unauthorized acts of cutting timber, excavating trenches, and building a road clearly constituted acts of "damaging * * * natural features" within the forest without authorization. Similarly, Section 261.10(b), which prohibits "[v]iolating any term or condition of * * * [an] approved operating plan" could hardly be clearer. The regulation plainly prohibits any deviation from the operating plan that is not authorized by a properly issued amendment.

The court of appeals correctly rejected petitioners' argument that 36 C.F.R. 261.1(b), which states that nothing in 36 C.F.R. Pt. 261 "shall preclude activities as authorized by the * * * U.S. Mining Laws Act of 1872 as amended," can be construed to invite miners to look beyond their operating plans and other pertinent regulations for statutory permission to conduct activities "reasonably incident" to mining. 90-453 Pet. 15-16. The regulations at issue cannot be read to permit the application of a test of reasonableness independent of the terms of the operating plan. As the court of appeals stated, "[t]he flaw in [petitioners']

argument is that 30 U.S.C. § 612 does not authorize mining operators to act without Forest Service approval," Pet. App. 25a, and the regulations make it plain that mining may not be conducted without prior approval, 36 C.F.R. 228.4(a), or in violation of an approved operating plan, 36 C.F.R. 261.10(k), or in a manner that would "damage any natural feature," without authorization, 36 C.F.R. 261.9(a). Thus, the regulations that were the basis of petitioners' convictions provide ample notice that the mining activities on petitioners' claims that violated their terms were prohibited.

3. Petitioner Rory Doremus also contends (90-453 Pet. 26-28) that there was a failure of effective notice as to the illegality of the petitioners' tree clearing because the operating plan did not expressly prohibit the removal of live trees to clear the ground over prospecting sites. He argues that the Forest Service regulations did not provide fair warning that activities not mentioned in the operating plan as well as activities expressly forbidden could be illegal under Section 261.9(a).

This claim ignores the structure and language of the operating plan regulations. Operating plans provide concrete, site-specific guidance as to the balance between mineral exploration and the protection of surface resources in the national forests. See 36 C.F.R. 228.1. As a practical matter, it would be virtually impossible for an operating plan to forbid every kind of possible damage to surface resources. Forest Service regulations instead call for a description of "the type of operations proposed and how they would be conducted." 36 C.F.R. 228.4(c). They further provide that "[o]perations shall be conducted in accordance with an approved plan." 36 C.F.R. 228.5(a). As contemplated by the regulations, petitioners' operating plan describes the scope and location of authorized activities. But, while the plan includes a number of express

prohibitions, Pet. App. 114a-131a,[12] the inclusion of those prohibitions cannot mean that anything not specifically prohibited in the plan is permitted. That is particularly true with respect to conduct such as destroying trees, which is elsewhere prohibited in the Forest Service regulations.

4. Petitioner Rory Doremus contends (90-453 Pet. 27-28) that in affirming his conviction under Section 261.9(a), the court of appeals repudiated controlling precedent and therefore unfairly imposed on him a new and unforeseeable construction of the scope of criminal liability in this area. This contention is incorrect; the Ninth Circuit case on which petitioner relies does not shield miners from prosecution for violations of valid regulations and operating plans.

In *United States* v. *Cruthers*, 523 F.2d 1306 (9th Cir. 1975), the court of appeals reversed a miner's conviction for the theft of 70 pine trees from the surface of an unpatented mining claim. The miner, who used the trees to construct a cabin on his adjacent, patented claim, was found guilty of theft based on a jury instruction that 30 U.S.C. 612(c) did not permit the use of timber from an unpatented claim on private property "for any purpose." The court found that Section 612(c) required that timber cut from an unpatented claim be used only for purposes "reasonably incident" to the development of that claim, but did not require that the timber be used within the physical limits of the claim. 523 F.2d at 1307. The court of appeals' brief opinion gives few facts and makes no mention of an operating plan.[13]

---

[12] Petitioners' unauthorized destruction of natural features encompassed not only the destruction of trees, but also unauthorized road construction and excavation. See Pet. App. 37a, 39a (violation notice noting damage to trees and "other surface resources"); see also Mag. Op. 4; Pet. App. 7a, 82a-83a. The road construction in particular violated an express prohibition in the operating plan.

[13] It is highly unlikely that Cruthers was subject to an operating plan when he cut the trees in question. The operating plan regulations

In any event, Ninth Circuit cases decided after *Cruthers* soundly refute petitioner's contention that the court has held that miners may conduct operations in violation of the requirements of their operating plans. See *United States* v. *Goldfield Deep Mines Co.*, 644 F.2d 1307, 1309 (1981) (affirming award of damages and injunctive relief against company that "cut trees, dug roads, erected structures, moved earth and otherwise damaged forest surface land" without an operating plan), cert. denied, 455 U.S. 907 (1982); *United States* v. *Weiss*, 642 F.2d 296 (1981) (affirming injunction against operations on unpatented national forest claim until miner complied with operating plan regulations); see also *United States* v. *Brunskill*, 792 F.2d 938 (9th Cir. 1986) (post-1985 case affirming injunction that required removal of buildings and equipment for failure to obtain operating plan). These cases, which hold that the right to conduct mining operations is contingent on compliance with the operating plan regulations, leave no doubt that petitioner's activities were subject to the same restrictions.

5. Finally, both petitioners attack the judgment below on the ground that the Forest Service violated a supposed policy of safeguarding miners' rights by using the prosecution of individuals who violate Forest Service regulations as "a compliance measure of last resort." 90-453 Pet. 21-24; 90-466 Pet. 9-10, 14-15. Petitioners derive this supposed policy principally from 36 C.F.R. 228.7, which calls for Forest Service officers to issue a "notice of non-com-

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were promulgated only 13 months before the appeal was decided. See 39 Fed. Reg. 31,317 (1974). It is not even clear whether Cruthers' unpatented claim was on national forest land or on a type of federal land for which operating plans are not required. See *Richardson*, 599 F.2d at 293-295 (discussing management of surface resources on unpatented mining claims by the Department of Interior's Bureau of Land Management).

pliance" when miners' violations of operating plan regulations cause unnecessary or unreasonable damage to surface resources, and from the general guidelines contained in Sections 2817.03 and 2817.3 of the Forest Service Manual, see Pet. App. 62a-69a.

The provisions on which petitioners rely present no obstacle to upholding petitioners' convictions. Section 228.7 of the operating plan regulations does not limit enforcement under Part 261 of 36 C.F.R., either expressly or by implication. As the court of appeals observed, the absence of independent enforcement provisions in Part 228 and the reference to operating plan violations in Section 261.10 undercuts any argument that Part 228 provides the exclusive means of enforcing operating plan violations. Pet. App. 10a-11a. And the Forest Service Manual, as the court of appeals stated, "merely establishes guidelines for the exercise of the Service's prosecutorial discretion; it does not act as a binding limitation on the Service's authority." Pet. App. 27a. That conclusion accords with the more general point that internal agency guidelines, unless mandated by the Constitution or a statute, do not have the force of law. See *United States* v. *Caceres*, 440 U.S. 741, 749-751 (1979); *United States* v. *Wilson*, 614 F.2d 1224, 1227 (9th Cir. 1980).[14]

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[14] Petitioner Rory Doremus's argument (Pet. 24-25) that the rule of lenity compels reversal of his conviction for destroying natural features is also without merit. The rule of lenity functions as a tie-breaker in cases in which the normal tools of statutory construction cannot resolve an apparent ambiguity in a criminal standard. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 29 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 342-343 (1981). Petitioners' convictions under Section 261.9(a), however, present no ambiguity to be resolved.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF WESTERN MINING COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE WESTERN MINING COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI

The Western Mining Council, Inc., files this brief as amicus curiae in support of the Petitioners' request for

a Writ of Certiorari. Consent to file the brief has been obtained from the attorney for Petitioner Rory Doremus, from Petitioner David Doremus, and from the attorneys for Respondent United States of America.

INTEREST OF AMICUS CURIAE.

The Western Mining Council, Inc., is a California non-profit corporation representing United States citizens who conduct mineral exploration and mineral development on the public lands of the United States, including on public land in the National Forests. The members of the Western Mining Council are some of the thousands of American citizens who explore for minerals and develop mines in the vast and largely unexplored forests, mountains and deserts of the Western United States. The Western Mining Council includes many individuals, small businesses, smaller companies (less than

50 employees), and many family or "mom-and-pop" mineral exploration and development businesses.

The Western Mining Council is concerned with the acts of unfair and unlawful discrimination against mineral prospectors and developers on public land, including tactics of the United States Forest Service ("Forest Service") specifically directed against thousands of small businesses and mineral development businesses. These tactics include the Forest Service's aggressive and wrongful enforcement of inapplicable criminal laws, the issuance of wrongful criminal citations against mineral developers and the imposition of unreasonable restrictions and conditions on operating plans and permits to do mineral prospecting and mining in the National Forests. The purpose of this brief as amicus curiae is to discuss how

the issues in this case and the Forest Service's continuing unreasonable activities are devastating and destroying the mineral exploration and development industry in the United States, to the detriment of the miners, the local economies, small businesses, and which are seriously detrimental to the productivity and security of the United States of America. The Forest Service is seriously inhibiting mineral exploration and development in the United States at a time when this country critically needs to encourage mineral development and production and to encourage small business generally.

The Western Mining Council respectfully requests that this Court, in rendering their opinion and in reviewing the Petitioners' convictions for removing trees from their valid mining claims, clarify the right of private

mineral developers relative to plans of operations without the necessity of a separate permit or plan amendment for each necessary act or for each tree which the miner finds reasonably necessary to remove, and confirm the inapplicability of certain criminal laws in the National Forests.

The existing Forest Service policy of aggressive issuance of citations for minor criminal offenses against miners in the National Forests, and the application of arbitrary criteria for "conditions" on operating plans imposed upon miners by local officers of the Forest Service, have created ambiguity, disputes and abuse by local Forest Service officers. Examples of such ambiguity and disputes are the instant case and the multitudes of other cases of petty offense violations and disputes over plan of operation conditions,

including those examples referred to in the opinions in **United States v. Craig**, CR-82-8-H (D.C. Mont 1984), in **United States v. Patrin**, Civil No. 1-72-135 (D.C. Idaho 1974), in the facts in the case reported by the court in **United States v. Weiss**, 642 F.2d 296 (9th Cir. 1981), in the facts in other cases cited in the briefs of both Petitioners in this petition, and, thousands of unreported field incidents. For these reasons, this court's review is needed, and the Western Mining Council submits this brief in support of the Petitioners' request for a writ of certiorari.

A WRIT OF CERTIORARI SHOULD BE GRANTED.

A. PETITIONERS' CONVICTIONS ARE UNCONSTITUTIONAL BECAUSE THEY ARE UNSUPPORTED BY LAW OR EVIDENCE, AND PETITIONERS' ACTS WERE AUTHORIZED UNDER THE MINING LAW.

The government's hearing evidence

before the U.S. Magistrate did not meet the burden of proof that the Petitioners' activities were unreasonable and unnecessary to the operation of their valid unpatented mining claims. The evidence did not show any illegal activity by either defendant, and the evidence showed that the acts of the Forest Officers were unjustified and illegal.

The mining claims of the Petitioners were valid, and the validity is not an issue here. These unpatented mining claims were being developed under the specific provisions of the General Mining Law (30 U.S.C. §21, et seq., as amended). The rights of individuals under the Mining Law have been specifically reaffirmed by Congress many times, notably including reaffirmation in 1955 in 30 U.S.C. § 612, in 1970 in 30 U.S.C. § 21(a), in 1976 in 43 U.S.C.

§ 1732, and in 1980 in 30 U.S.C. § 1601. The Forest Service regulations themselves specifically provide that "...[n]othing in [36 C.F.R. § 261] shall preclude activities as authorized by ... the U.S. Mining Laws Act of 1872, as amended."

The activities of the Petitioners were authorized by the Mining Law and by numerous judicial reaffirmations thereof, as established in the express holding in **U.S. v. Caruthers**, 523 F.2d 1306 (9th Cir. 1975), that the statutory authority granted to the owner of a mining claim under 30 U.S.C. § 612, precluded the owner's criminal conviction for the removal of trees from his claim. The activities of the instant Petitioners were also authorized under the Forest Service regulations themselves. Since the Petitioners' activities were not shown to be un-

reasonable or illegal, the Petitioners cannot be prosecuted for these acts.

The Court of Appeals upheld the instant criminal convictions based upon Petitioners' alleged violations of 36 C.F.R. §§ 261.9(a) and 261.10(k), which prohibit "...[d]amaging any natural feature or other property of the United States" (36 C.F.R. § 261.9(a)), and "...[v]iolating any term or condition of ...[an] approved operating plan." (36 C.F.R. § 261.10(k)). Petitioners' convictions under 36 C.F.R. §§ 261.9(a) and 261.10(k) conflict with, and are specifically preempted by, 36 C.F.R. §§ 261.1(b), 261.6(a), 261.6(b), 261.9(a), and 30 U.S.C § 612. 36 C.F.R. §261.1(b) provides that "... [n]othing in this part [i.e., 36 C.F.R. §261] shall preclude activities authorized by ... the U.S. Mining Laws Act of 1872 as amended." 30 U.S.C § 612(a) prohibits

removal of vegetation "... [e]xcept to the extent required for mining claimant's prospecting, mining, or processing operations and uses reasonably incident thereto, ... or to provide clearance for such operations or use." So, contained within 36 C.F.R. § 261 is the specific authority that any conflicting provisions of § 261 will be preempted by the Mining Law.

The court in U.S. v. Weiss, supra, at 299, stated that 36 C.F.R § 261.1(b) is a recognition that mining operations "... may not be prohibited nor unreasonably circumscribed as to amount to a prohibition." That acknowledgement clearly establishes the supremacy of the General Mining Law's provisions over the restrictive and conflicting prohibitions contained in the regulation in 36 C.F.R. §§ 261.9(a) and 261.10(k).

B. THE LAWS AND FOREST SERVICE REGULATIONS WERE APPLIED IN AN ARBITRARY AND DISCRIMINATORY MANNER IN THIS CASE.

Petitioners' convictions are unconstitutional in that the Forest Service, in issuing Petitioners a criminal citation, applied its regulations in an arbitrary and discriminatory manner in violation of the doctrine of equal protection of the laws under the United States Constitution. The long line of cases of illegal government discrimination based upon race is useful in analyzing the instant case. In an early discrimination case, **Yick Wo v. Hopkins**, 118 U.S. 356 (1886), the Supreme Court invalidated a San Francisco city ordinance which allowed the rejection of a permit for Yick Wo to operate a laundry in a building not constructed of brick or stone, where the authorities approved laundry permits for non-Chinese persons

to operate in such buildings while rejecting all applications by Chinese. The court reasoned that "... the idea that any man's livelihood depends upon the mere will of another is the essence of slavery ... [if the disapproval be administered] with an evil eye and an Unequal Hand ...", and that such would be an unconstitutional denial of equal justice.

The Yick Wo and the instant Doremus cases are analogous in that, while not racially motivated, the Forest Service in the instant case is arbitrarily, intentionally and unlawfully preventing particular persons, i.e., mineral prospectors and developers, from validly exercising their rights under the Mining Law and the U.S. Constitution. The Forest Service's issuance of arbitrary citations and their placing of unjustified "conditions" upon miners'

operating plan "approvals" under 36 C.F.R. § 261.1(a), are nothing more than arbitrary de facto denials of citizens' rights to conduct good faith mineral exploration and mining in the National Forests. The preventing of the Petitioners from operating on their valid mining claims in the National Forest by the means of criminal citations for alleged petty offenses and by unreasonable operating "conditions" is somewhat more sophisticated that the denial of Yick Wo's laundry permit, but each is a wrongful deprivation of rights by a government agency. The instant Doremus case demonstrates most clearly the arbitrary and unconstitutional discrimination against mineral prospectors and miners in the National Forests, particularly in view of the specific mandate in its own Forest Service Manual (§§ 2814.21 and 2814.24) to "... respect

[mining] claims and claimants' property ..." and to provide to "... prospectors and miners operating plan provisions in order that they may carry out necessary mineral associated activities." The express Forest Service policies are set out in the United States Forest Service Manual, in the regulations and in the statues, including the following:

> "The right of reasonable access for purposes of prospecting, locating and mining is provided by statute." Forest Service Manual, § 2813.14;
>
> "The Forest Service must respect claims and claimants' property by using precautions to avoid damage to claim corner markers, excavations, and other mining and improvements." Forest Service Manual, § 2814.21;
>
> "Forest officers should provide bona fide prospectors and miners reasonable alternative access routes, exploration methods, special use permits, and operating plan provisions in order that they [i.e., the prospectors and miners] may carry out necessary mineral associated activities without violation of laws and regulations." Forest Service Man-

ual, § 2814.24;

"Nothing in 36 C.F.R. § 261 shall preclude activities as authorized by the Wilderness Act of 1964 or the U.S. Mining Laws Act of 1872, as amended," 36 C.F.R. § 261.1(b).

These statements of law and policy are very clear and unequivocal, and must be held to override the arbitrary "unwritten" power of local Forest Service officers to issue arbitrary citations or to attach unworkable or unreasonable conditions to the "approval" of a miner's otherwise reasonable plan of operations under the purported authority of 36 C.F.R. § 261.1(a).

The local Forest Officer has been given the power to "approve" the miner's plan of operations, or to "... place such conditions on the authorization as the officer considers necessary for the protection or administration of the National Forest System, or for the promotion of public health, safety or

welfare." 36 C.F.R. § 261.1(a).

The authority of a Forest Service officer to determine whether a specific activity is "... damaging any natural features" or "... violating any term or condition of ... [an] approved operating plan ..." under 36 C.F.R. § 261.1 (a) was clearly too broad and vague on its face to be reasonable or workable. In the instant case, the direct and immediate effect of the "conditions" imposed upon the Doremus brothers by the Forest Officer under the authority of 36 C.F.R. § 261.1(a) was to deprive the Doremus brothers of their chosen livelihood of reasonably developing unpatented mining claims in the National Forest. As set out in the trial transcript, and as is patently obvious, although technically "possible," it is not reasonably feasible for a miner to stop all mining

operations in order to reapply for a plan amendment each time it becomes reasonably necessary to cut down an unanticipated tree or to dig another reasonable trench. To impose such a requirement on miners would frustrate mining operations to such a degree as to make them economically prohibitive, and such a requirement would terminate many legitimate mineral exploration and development operations--a result which the Forest Service regulations, public policy, common-sense national survival instinct and the U.S. Constitution specifically forbid.

This court's reversal of the two Petitioners' erroneous convictions in this case would partially alleviate the Doremus brothers' current impediment to carrying on their livelihood as virtually the last remaining miners in the Nez Perce National Forest in Idaho.

However, the Western Mining Council is gravely concerned that the rights of the Doremus brothers, and of all other mineral developers in the National Forests in the United States, are seriously endangered, and that these rights should be clarified relative to a citizen's right to prospect and mine in a National Forest under the Mining Law, specifically including a miner's right to legally cut some trees in the reasonable development of his mining claim.

The Western Mining Council hereby respectfully requests that this Court, in granting certiorari and in accepting in this case, specifically delineate reasonable criteria which apply to the facts in this instant Doremus case, as well as to other mineral prospectors and miners, relative to their rights to prospect and mine in National Forests under the Mining Law, free from unlawful

restriction. This Court should define and delineate the limited permissible scope of Forest Service control over mineral exploration and development in National Forests; and the result would be guidelines obviating many detrimental and economically fatal delays and difficulties such as those experienced by the Petitioners in the instant case, and by many others.

The Forest Service "petty offense violation" procedures, when combined with other tactics as set out in the hearing transcript in this case, clearly show the potential and actual abuse and "arbitrariness," particularly when the same Forest Service officer who administers and writes up the "plan conditions" also writes the citations.

Many federal administrative agencies "administer" all three functions of government (executive, legislative and

judicial) within the province of the tasks delegated to them by Congress. However, the opportunity for arbitrary action, and specific instances of abuse, must be fully considered when reviewing such a broad "sub-sub-delegation" of power as the instant regulations empowering the local Forest Service officer to issue citations, and, also, to "place such conditions" on his approval of the operating plan as "the officer considers necessary for the protection or administration of the National Forest System, or for the promotion of public health, safety, or welfare." (36 C.F.R. § 261.1(a)).

If a Forest Service officer chose to prohibit all mineral exploration and development in "his" National Forest, it would be, and is, all too easy for him to do so by issuing citations for alleged petty offenses, and by imposing

difficult plan conditions under the overly broad and vague delegation of multiple powers to Forest Service officers under 36 C.F.R. § 261.1(a).

The instant case cries out for clarification of the scope of Forest Service authority to arbitrarily deny to mineral developers the reasonable freedom of activity upon which their livelihood depends; and this case is just such an opportunity for this Court.

C. THE ISSUES PRESENTED HEREIN ARE OF CRITICAL IMPORTANCE TO MINERAL EXPLORATION AND DEVELOPMENT IN THIS COUNTRY AND TO THE PRODUCTIVITY AND SECURITY OF THE UNITED STATES.

The significance of the issues presented herein cannot be minimized at a time when this country's future prosperity, economic well-being and military security rest so squarely on our ability to continue to efficiently explore for and supply minerals to our country.

The primary source of minerals in the United States is the public lands which are open for mineral exploration and development. This country depends upon our incentive-based Mining Law to motivate citizens to explore for minerals, to develop mining operations and to provide the United States with a reliable continuous flow of minerals for industrial, commercial and military uses.

If mineral development is further impeded in the United States, the result will be the loss of future discoveries and development of those minerals vital to the productivity and security of this country. Forest Service practices have already terminated most mineral exploration and development in National Forests by issuing "fatal" criminal citations for alleged minor offenses and by placing overly restrictive conditions on

plans of operation. The Forest Service has effectively eliminated thousands of mineral development operations on our public lands, including those of the Doremus brothers, who had maintained "virtually the last of the operating mine in the Nez Perce National Forest in Idaho." The instant case is an example of arbitrary over-regulation of mineral development through the use of unjustified criminal citations and unreasonably restrictive conditions on plans of operation. These violations of the express mandate of the Mining Law, and the express letter and spirit of the Forest Service Manual, have "thrown out" large numbers of mineral developers and miners from public land in the National Forests.

Our National Forests do not "belong to" the Forest Service, they are public land open to mineral exploration by U.S.

citizens under the Mining Law. Because the Forest Service literally "loses control" of the land when minerals are discovered, a "turf war" results when a mineral developer seeks a Forest Service permit, because the Forest Service controls only the land surface, and want to "keep" control. The result is not only a "chilling" effect, but the absolute destruction of a large majority of the legitimate mineral developments on "Forest Service" land, causing a substantial reduction of mineral exploration and development in the United States.

It is essential to the security and productivity of the United States that we maintain and increase our mineral exploration and development in this country in order to prevent the United States from becoming dependent upon and subservient to foreign sources for

minerals.

Despite the expressly stated U.S. policy of encouraging mineral exploration and development, recent substantial decreases in mineral development has resulted in the loss of thousands of jobs and small businesses, which have been "exported" overseas. Foreign nations are more than anxious to develop their own mineral resources and to sell their minerals to the United States. In September 1990 Mexico dropped their "51% Mexican ownership" requirement to encourage their own mineral development, and now allows 100% non-Mexican ownership of mineral operations.

Vigorous recent foreign mineral development combined with obstructive U.S. governmental actions is resulting in the following devastating long-term detrimental effects and costs to the United States and to its citizens:

Cost #1--Dependence Upon Foreign Sources for Minerals. Probably the most serious effect of the devastation of the U.S. mineral exploration and development industry is the increased dependence of the United States upon, and subservience to, unreliable and unpredictable foreign sources for essential minerals and rare earths indispensable to maintaining our dominant position in military hardware, space technology, nuclear fusion and superconductivity. We cannot fault Mexico developing their minerals. Rather, we should seek to decrease our own dependence upon and our potential subservience to foreign sources for essential minerals from South Africa, the Soviet Union, Mexico and, recently, even from Mongolia and Vietnam. No dollar value can be placed upon the U.S. retaining its position as the world leader in high technology research,

security and national defense. The list of affected minerals is long and varied, including: Iron ore, rare earths, rhodium, palladium, other platinum group metals, precious metals, talc, titanium, chromium, and others.

Cost #2 -- Increased Prices of Minerals. Dependence upon foreign mineral sources will result in the increased cost of many essential minerals and rare earths, with prices continuing to rise because of the disappearance of the supplies and identified future sources of these minerals from the United States public lands. The U.S. will then be subject to the uncertainties of unreliable foreign sources and cartels for many essential, critical and strategic minerals, just as we were in the oil "shortage" of the 1970's, and as we are today dependent upon South Africa and the Soviets for

virtually all of our chromium and rhodium. The price of rhodium has skyrocketed from $1,300/ounce in November 1989 to $6,000-$7,000/ounce today, and is expected to rise even more soon.

Cost #3--Fifth Amendment "Takings". Many of the restrictions and regulations which destroy and close down mineral development operations in the United States have resulted in compensable takings under the Fifth Amendment. Executive Order No. 12630 (Fed. Register, March 16, 1988), as reissued by President Bush in 1990, requires that all federal agencies provide a specific written Taking Implication Assessment ("TIA") on the effect of agency regulations and decisions on the taking of private property, explicitly identifying and including "regulatory takings" as compensable. This court has specifically held that it "... is established

by innumerable decisions of this court and of state and lower courts that ...a mining claim ... is property in the fullest sense of that term." (**Wilbur v. United States ex rel. Krushnic**, 280 U.S. 306, 316 (1930)). The courts fully recognize the compensability of takings and "regulatory takings," as was aggressively reaffirmed by the recent line of cases starting with the two June 1987 decisions **First Evangelical Church of Glendale v. County of Los Angeles**, 482 U.S. 384 (1987) and **Nollan v. California Coastal Commission**, 483 U.S. 825 (1987). It is clear that the United States or a state can take any property it chooses for a public use; but, "...private property may not be taken for public use without just compensation." (U.S. Const. amend. V.) So, we have the resultant critical dual reasons why mining claims should not be restricted and be taken,

i.e., these takings will cost the taxpayers many billions of dollars, and, secondly, the mineral exploration, development and productivity of the United States will be seriously hurt.

Cost #4--Non-Compensable Losses and Homelessness. Thousands of American jobs have already been lost and persons made homeless by arbitrary restrictions placed upon mineral exploration and development. Particularly hard hit are U.S. small businesses, independent family mining businesses, mineral development companies, related service and support businesses, and, of course, the thousands of future prospective mineral exploration and development businesses. Most of these private future losses of businesses, income and property will be non-compensable takings.

Absent effective and continuing mineral exploration and development the

United States will be faced with the following: Subservience to foreign sources for essential minerals; higher mineral prices; greater world-wide environmental pollution due to minimal foreign environmental controls and millions of gallons of diesel fuel used in shipping foreign minerals for ultimate consumption in the United States; billions of dollars of takings and "regulatory taking" of mining operations; decreased U.S. productivity and G.N.P.; decreased U.S. security resulting from dependence upon foreign sources for essential minerals; and an increased U.S. trade deficit resulting from buying foreign minerals while ours lie "fallow" on U.S. public lands. This country's vitality and world leadership position can only be maintained by adhering to the established public policies of encouraging and assisting mineral

exploration and development and by prohibiting the disabling practices and arbitrary actions of governmental agencies, specifically including the actions of the Forest Service in the instant Doremus case.

CONCLUSION

The Petitioners' criminal convictions, although seemingly simple and isolated, could have a profound and lasting effect upon the United States. Just as freedom of speech is chilled by each act of censorship, so the productivity of this country is quelled by acts which interfere with the citizens' rights to explore for minerals under the incentive-based Mining Law.

On behalf of those persons who choose mineral exploration and development on public land as their livelihood, including the Petitioners, the Western Mining Council respectfully requests and

implores this court to grant certiorari in this case, to provide an opportunity to clarify the validity of Forest Service practices of imposing arbitrary repressive conditions on plans of operation and of issuing unjustified criminal citations. This court should consider the strong public policy, and the specifically stated legislative policy, of encouraging mineral exploration and development on U.S. public lands.

This instant Doremus case cries out for Court direction to stop the misuse of bureaucratic devices which "chill" and destroy legitimate and desperately needed United States mineral exploration and development. This case demonstrates the need for a more detailed specification of the requirement that the Forest Service respect and encourage mineral development in the National

Forests.

The Petition for Writ of Certiorari should be granted, and the judgments and rulings below should be reversed.

Thank you for allowing the Western Mining Council to present its views and arguments on behalf of granting a writ of certiorari as requested by Petitioners Doremus in this matter.

Respectfully submitted,

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